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COMPOSITE STUDY ON THE PROTECTION OF TRADITIONAL KNOWLEDGE

Document prepared by the Secretariat

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I. OVERVIEW

1. This document draws together in one comprehensive resource the diverse information about the intellectual property (IP) protection of traditional knowledge (TK) that has been considered by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the "Committee"). This material includes surveys of Member State mechanisms for TK protection, specific (*sui generis*) laws on the protection of TK, case studies on the use of IP to protect TK, and analysis by the Secretariat of issues such as operational definitions of TK and elements of *sui generis* TK protection, as well as the material gathered in the wide-ranging consultations with TK holders that the Secretariat conducted in 1998-99.

2. The Committee at its fourth session requested a composite study that included approaches to definitions of TK, national experiences in TK protection and analysis of elements of a *sui generis* system. The structure of this document reflects this decision. Section II provides a brief background to the study and the earlier documents it draws on. Section III discusses in general the notion of "protection of TK," and considers possible approaches to protection, clarifying what is meant by protection of TK in the intellectual property sense. It illustrates that, in the context of protection of TK, that the applicable concept of TK is influenced by the objective of the protection that is intended. Drawing on documents earlier considered by the Committee, Section IV considers approaches to defining 'traditional knowledge' and proposes a working and comprehensive definition. Section V reviews the experience of legislative protection of TK in several jurisdictions (based on earlier reports and studies considered by the Committee), including sui generis protection. Section VI focuses on existing national laws for *sui generis* protection. Section VII elaborates on possible elements of *sui generis* systems for TK protection, revisiting the checklist earlier used in the Committee[1] to highlight the policy and administrative options for TK protection systems and taking account of input from earlier sessions of the Committee. Section VII summarizes the current range of options on possible approaches to IP protection of TK.

II. INTRODUCTION

3. The Committee has from the outset addressed the protection of traditional knowledge both through conventional IP systems and through distinct *sui generis* systems of protection. This has included general policy discussion as well as the consideration of actual experience with TK protection. At its third and fourth sessions, the Committee reviewed a range of national experiences with the legal protection of TK,[2] considered operational terms and definitions of TK, [3] and discussed possible elements of a *sui generis* system for the IP protection of TK. [4] It also considered the relationship between the general concept of 'TK,'

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1 Documents WIPO/GRTKF/IC/3/8 and 4/8

2 Documents WIPO/GRTKF/IC/3/7, 4/7 and 5/7

3 See *Report* of the third session, document WIPO/GRTKF/IC/3/17, paragraphs 212 to 266, and *Report* of the fourth session, document WIPO/GRTKF/IC/4/15, paragraphs 133 to 164.

4 See *Elements of a Sui Generis System for the Protection of Traditional Knowledge*, documents WIPO/GRTKF/IC/3/8, of March 29, 2002 and WIPO/GRTKF/IC/4/8, of October 30, 2002, and *Traditional Knowledge – Operational Terms and Definitions*, document WIPO/GRTKF/IC/3/9, of May 20, 2002.

and the more specific concept of 'expressions of folklore'[5] and 'traditional cultural expression.'

4. Following a proposal at its fourth session[6] that these distinct, but intertwined, topics should be combined into a composite technical study, which "would enable the Committee to have an in-depth look at the issues involved," the Committee decided that:

> "[B]ased on documents WIPO/GRTKF/IC/4/8, WIPO/GRTKF/IC/3/9 and other materials, the Secretariat should prepare a composite study incorporating approaches to definitions of TK, national experiences in TK protection and analysis of elements of a *sui generis* system for protection of TK, on the understanding that this would be a more structured, concrete analysis of specific options."[7]

Related Committee documents

5. In order to provide the Committee with a single, composite reference on the *sui generis* protection of TK, this document sums up and draws together a wide range of material earlier considered by the Committee, in particular the analysis of WIPO/GRTKF/IC/3/9 (on definitions of TK) and WIPO/GRTKF/IC/4/8 (on elements of *sui generis* protection), as agreed by the Committee,[8] but also the successive surveys of national legal approaches to TK protection that were developed and reported in documents WIPO/GRTKF/IC/3/7, WIPO/GRTKF/IC/4/7 and WIPO/GRTKF/IC/5/7. Given the overlap between TK protection and the protection of traditional cultural expressions (TCEs) or expressions of folklore, this document also draws on the parallel surveys concerning protection of TCEs that were provided in documents WIPO/GRTKF/IC/3/10, WIPO/GRTKF/IC/4/3 and WIPO/GRTKF/IC/5/3. Each of these documents may be consulted for further details of the issues covered here.

6. The parallel resource document WIPO/GRTKF/IC/5/INF/2 ("Information on National Experience with the Intellectual Property Protection of Traditional Knowledge") contains detailed background information on the protection of TK in national legal systems, including texts of national laws for *sui generis* protection (contained in Annex III), and is referred to extensively in the present document. A synthesis and overview of the issues considered by the Committee is provided in document WIPO/GRTKF/IC/5/12, which deals with some of the general systemic and policy issues relevant to TK protection, such as the nature of IP protection when applied to TK and TCE subject matter, the role of positive and defensive protection strategies, the role of IP protection within a broader conception of preservation and safeguarding traditional cultures and legal systems, and different forms of IP protection.

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5 Document WIPO/GRTKF/IC/3/9

6 *Report* of the fourth session, at paragraph 134.

7 *Id.*, at paragraph 163 (i).

8 See *Report* of the fourth session, WIPO/GRTKF/IC/4/15, at paragraph 175(vii).

III. THE IP PROTECTION OF TK

(a) Protection of TK in an IP context

7. There are diverse notions of protection, preservation and safeguarding of traditional knowledge. Protection can apply directly to TK as an object of protection in itself, to the preservation of the social and cultural context in which TK is developed and maintained, and to the distinctive forms and expressions in which TK is communicated and transmitted. Protection may also be directed towards distinctive signs, symbols and reputations associated with a community's TK. Each of these protection contexts is vitally important and the overall approach to protection needs to be comprehensive and responsive to the needs and interests of the traditional community concerned. In keeping with the general focus and mandate[9] of the Committee and the role of WIPO in international cooperation, [10] this present document focusses on IP protection of TK, or the protection of TK in an intellectual property sense. IP protection of TK would normally entail the recognition of specific rights in the TK itself or rights somehow associated with the TK, rights which give the capacity to restrain others from using the protected knowledge without authorization. Even within the sphere of IP protection, the Committee has developed a distinction between 'positive' intellectual property protection and 'defensive' intellectual property protection.[11] This section aims to clarify what is intended by IP protection as such, in contrast to more general notions of protection of TK, and to consider what this means for the definition of TK and the approach to its protection.

Need for IP protection: the question of definitions

8. The work of the Committee has in general highlighted the vital importance of appropriate forms of IP protection for TK, and in particular approaches to protection that strengthen the capacity of TK holders and traditional communities to identify and safeguard their interests vis-à-vis the IP system. Many Committee participants have stressed the need for enhanced protection of TK, attaching varying levels of emphasis on the implementation of improved ways of applying conventional IP tools to TK subject matter, or on the development of *sui generis* or specifically tailored TK protection laws. This has led to a need to clarify what is meant by the core concept of 'protection' of TK, and to clarify the intention or policy goal of TK protection. This has been necessary background even to the question of how the term 'traditional knowledge' should be defined in practice. From a policy perspective, the general concept of TK has an holistic quality and a potentially very wide scope, reflecting its integral relationship with the life, cultural identity and spiritual beliefs of many local and indigenous communities. Yet to establish or give effect to specific forms of legal protection of TK beyond its traditional context (especially if this goes beyond its "home" jurisdiction, or in an international context) may require a distinct, more functional definition that corresponds to the form of protection that is required. The Committee's discussions have highlighted that how one defines TK inevitably depends on the prior question of what form of protection is intended.[12] In turn, the form of protection of TK will differ depending on the policy goal that is being addressed and the legal rationale for protection of the TK. A very broad, inclusive

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9 See *Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, document WO/GA/26/6, of August 7, 2000, at paragraph 23.

10 Article 3(1) of the Convention Establishing the World Intellectual Property Organization (signed at Stockholm on July 14, 1967 and as amended on September 28, 1979).

11 WIPO/GRTKF/IC/5/12, paragraphs 19-30 (see also paragraphs 15-17, below).

12 See document WIPO/GRTKF/IC/5/12, paragraph 41.

definition of TK may be useful for general descriptive purposes, but may not serve as an effective basis for a specific form of legal protection.

What is protection?

9. When clarifying what is intended by 'protection' of TK, the key policy question is whether protection is intended in an IP sense, or in another more general sense, such as when TK is safeguarded, preserved or collected to ensure its continued existence. TK can be 'protected' through a range of legal mechanisms, such as through contracts and licenses, or national laws governing such issues as environmental protection, cultural heritage or the interests of Indigenous people. In each case, a different concept of TK may correspond to each different notion of protection, and the formal legal definitions of TK vary accordingly.[13] In addition, TK protection systems may have specific policy goals, and this may limit the way traditional knowledge is defined for the purposes of meeting those goals. This is apparent in a number of cases where TK protection is linked with environmental objectives. For example, when TK protection is part of a broader regime governing access to genetic resources and protection of biological diversity, the definition of TK for the purposes of its protection may be limited to TK associated with genetic resources, rather than a wider range of TK subject matter. Alternatively, protection may be focussed on traditional medicinal knowledge, and the means of protection tailored for that subject matter.

Example of TK within the context of the CBD

10. The Convention on Biological Diversity (CBD) may help illustrate the range of different approaches to protection of traditional knowledge that may arise within the one policy context and within one legal document.[14] Under Article 8(j) of the CBD, TK should be *respected*, *preserved* and *maintained;* its application should be*promoted* with the approval and involvement of its holders; and its utilization should lead to the *equitable sharing of benefits* arising from its utilization.[15] These various complementary objectives illustrate the varying relationship between preservation and protection, and the differing notions of protection that may be necessary to achieve an overall policy goal. This provision has been the subject of extensive discussions within the forums established under the CBD, and a wide range of regulatory and legal tools may be drawn on to achieve these various goals. IP mechanisms (whether they are conventional IP rights or specific *sui generis* forms of protection) can be useful, but are unlikely to be sufficient. IP protection is not primarily directed to preserving and maintaining knowledge, although it may encourage or lead to such outcomes as secondary effects, such as by strengthening incentives for preservation of knowledge. IP protection may specify how TK is to be respected, may ensure that the process of preservation does not undermine the TK holders' interests and that TK is used with their approval, and can be used to structure and define arrangements for benefit sharing. These objectives are related to one another, but require distinct ways of using IP mechanisms, which may also need to operate in conjunction with other legal and practical tools.

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13 See the survey of definitions provided in the Annex of document WIPO/GRTKF/IC/3/9.

14 This discussion of definitions provided is illustrative background only, and is not intended to interpret or apply the text of the CBD in any authoritative way, nor to draw any firm conclusions about the effect or intent of any CBD provisions.

15 See the summary of this discussion in document WIPO/GRTKF/IC/5/12, paragraphs 17 and18.

11. IP protection operates in a dynamic environment, and is generally concerned with the conditions under which protected material is used, exploited and disseminated (and in giving its holders the right to prevent or set conditions for such use), in the broader context of promoting cultural, technological and economic development, and international trade. The concept of promoting the equitable sharing of benefits from the use of TK is one way of applying IP protection, although it does not necessarily entail the establishment of an IP regime. For example, benefit sharing may be established under systems of licenses issued by government authorities, through fees and other remuneration, or through appropriate contractual arrangements with TK holders. These non-IP options may be seen as ways of encouraging benefit sharing. However, under a contractual approach, TK holders would not be able to enforce rights or interests against third parties who are not bound by contract. And under a remuneration system, TK holders may not have the entitlement to say 'no' to the use of TK by others. An IP form of protection would normally entail giving TK holders the entitlement to enforce their interests against third parties, and to grant or withhold authorization for the use of the protected TK (although IP systems can set limits to such entitlements). IP protection can also provide the legal basis for negotiations on the exact nature of benefits and how they are to be shared equitably.

The objective of IP protection of TK

12. IP protection of TK may be viewed as an end in itself, or as one choice of policy mechanism to achieve a distinct policy goal. The CBD context illustrates how IP protection of TK may serve as one means of promoting the objectives of that Convention, in the context of the widely-discussed provisions of Article 8(j) and elsewhere in the CBD. For instance, linked with the "protection" covered by Article 8(j) is the requirement under Article 10(c)[16] for Contracting Parties, 'as far as possible and as appropriate' to 'protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.' In referring to customary use in accordance with traditional cultural practices, this may require both the protection and the promotion of the use of traditional knowledge associated with biological resources. IP protection of TK may entail a dynamic balancing of the goal of protection as against the goal of promotion of use. IP systems generally seek to promote dissemination or use of protected subject matter by clarifying ownership interests.

13. The CBD contains two other references to TK: Article 17(2) lists "indigenous and traditional knowledge" as one of the elements of information the exchange of which should be facilitated between Parties; and Article 18(4) invites Parties to "encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of [the] Convention." These provisions may potentially be implemented through licensing and transfer agreements, and in this case, a clearer IP framework for TK protection may enhance legal security and reduce transaction costs. But direct IP protection of the TK as such may not be essential, and contracts and licensing systems may provide for similar results, with differing costs and efficiency.

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[16] "[…] [A]rticle 10(c) should be read in conjunction with article 8(j) which encourages Parties to respect, preserve and maintain the knowledge […]." See Lyle Glowka *et alii*, *A Guide to the Convention on Biological Diversity*, IUCN 1994, at 60.

14. The distinction between IP protection and general notions of protection of TK is highlighted by the fact that the CBD tends to refer to respect, preservation, maintenance or use of *knowledge*, rather than respect, preservation, maintenance or use of *rights in knowledge*. This illustrates how IP rights, or specific rights in knowledge, may need to take their place alongside other policy options to achieve the more general goal of 'protection' of TK, including protection against loss of TK. Even notions of equitable benefit sharing may involve differing notions of exclusivity of protection as against rights of remuneration and rights to receive non-monetary benefits.

Defensive IP protection of TK

15. Within the general conception of IP protection of TK, the Committee has discerned different forms of positive protection and defensive protection of TK. A full discussion of these concepts is provided in document WIPO/GRTKF/IC/5/12 (paragraphs 19-30). "Defensive" protection is intended not to establish specific rights or other interests in TK subject matter but, rather at preventing others from asserting or acquiring IP rights over TK subject matter. Document WIPO/GRTKF/IC/5/6 summarizes a wide range of defensive approaches that have been discussed or developed in the work of the Committee. These include making of information available to patent and trademark examiners so that formal IP rights are not granted in TK that is in the public domain (as far as patents are concerned) or that is a protectable element of identification of Indigenous peoples and traditional communities (as far as trademarks are concerned). Work in this area corresponds to databases and other inventories of information that is thus made available to patent examiners as well as to databases of insignia that trademark examiners can consult.[17]

16. Generally, this form of defensive protection is not achieved by actively asserting IP rights, although in some circumstances, applying for or obtaining IP rights may form part of a "defensive" protection strategy. For instance, there is an established practice of filing patent applications as a defensive strategy to ensure that third parties cannot subsequently claim rights over the material disclosed in the patent specification (there are also specific disclosure mechanisms within patent law systems). Trademark laws can provide for defensive registration or the recognition of certain official signs or marks, to prevent others from gaining rights or using adverse trademark rights. In these cases, the goal is not the commercial exploitation of the subject matter of those rights, but simply to acquire or to assert a right in order to exclude others from gaining using their IP-protected TK.[18]

17. Generally speaking, defensive protection of TK entails a range of practical strategies within the general IP legal framework, although specific legal provisions may be enacted to facilitate defensive protection (such as defensive registration). The present document concentrates on legal mechanisms for the positive protection of TK through IP rights.

Scope of protected subject matter

18. The different approaches to the positive protection of TK highlight the need to clarify first what is the scope of knowledge that is protected, as well as the scope of rights granted.

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[17] See document WIPO/GRTKF/IC/5/7, at paragraphs 12 ("Experiences with the use of traditional IP mechanisms for the defensive protection of TK").

[18] See *Consolidated Survey of Intellectual Property Protection of Traditional Knowledge*, document WIPO/GRTKF/IC/5/7, at paragraph 8.

The discussion below will focus in more detail on the approaches to definition of TK within an IP protection system, but it is important to clarify the general sense of 'traditional knowledge.' This term has been used in the work of the Committee as an umbrella concept, referring to a general field of work and policy interest (TK in the general sense, or *'lato sensu'*). It has also been used in a more focussed sense (TK in a more rigorous sense or '*stricto sensu'*) to 'refer to the content or substance of traditional know-how, skills, practices and learning, while recognizing that this content or substance may be considered integral with traditional ways of expressing the knowledge and the traditional context in which the knowledge is developed, preserved and transmitted. This reflects the view that TK must refer to 'knowledge' in a general sense, but knowledge with a specifically traditional character. Protection would apply to the knowledge as such, and restrain the unauthorized use of the knowledge; this could include unauthorized disclosure of secret or sacred TK.'[19] This is by way of contrast with protection of TCEs (synonymous with expressions of folklore), which is essentially concerned with protection of an expression as such, and not the idea or content (the copyright doctrine of the dichotomy between idea and expression may help to clarify this distinction).[20]

19. The work of the Committee has therefore been based on a general distinction between protection of TK as such, and protection of TCEs or expressions of folklore. This is for the sake of clarity about the different forms and subject matter of protection. It does not preclude both forms of subject matter being covered by the one legal system.[21] In addition, some creations embody both technical content and forms of expression in the one object. This is a familiar concept from IP law generally, in which different aspects of the one product may be protected by complementary IP rights – such as copyright or design protection over certain aspects of the shape or expression, patent or utility model protection for functional aspects, and trademark, geographical indication or unfair competition protection for distinctive characteristics. In the general domain of TK protection, handicrafts are a good example of this amalgam of protected subject matter – handicrafts may incorporate technical content, aesthetic or other cultural values, and may possess distinctive characteristics (including specific geographical or local qualities). Hence handicrafts may be protected through the protection of the technical ideas they embody, or through the protection of the expressions of culture they represent, or through the protection of the distinctive characteristics of signs or marks associated with them.[22]

20. In any event, the narrowing or the broadening of the scope of the TK subject matter that is to be given legal protection will necessarily have an impact on the nature of its protection, and the form of rights that give effect to its protection. Protection of expressions, will necessarily be more concerned with cultural values, including moral rights, while "protection" of technical subject matter or the content of knowledge will focus predominantly on the economic and technical impact of uses. Eventually, the very nature of rights conferred will vary depending on the subject matter covered: while elements of TK that primarily serve the

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19 Document WIPO/GRTKF/IC/5/12, at paragraph 42.

20 Document WIPO/GRTKF/IC/5/12 deals with the distinction between the protection of On expressions of folklore, see Consolidated Analysis of the Legal Protection of Expressions of Traditional Cultural Expressions, document WIPO/GRTKF/IC/5/3, and Final Report on National Experiences with the Legal Protection of Expressions of Folklore, document WIPO/GRTKF/IC/3/10.

21 See, for example, Annex III of document WIPO/GRTKF/IC/5/INF/2.

22 See discussion in document WIPO/GRTKF/IC/5/7, paragraph 9.

purpose of identifying traditional communities may not be transferred or assigned to third parties, it is possible to envisage licensing agreements involving technical TK.[23] This, regardless of the fact that technical TK has also a purpose of cultural identification, as it will be explained below. However, when it comes to technical TK, its use for culturally identifying a community does not correspond to its primary purpose. Of course, the last word on this aspect should lie in the hands of TK holders themselves. Nobody can take that sort of decisions on behalf of TK holders. What law can do is to leave options open for TK holders to use them as they see fit.

21. For that to happen, it is important to ensure that TK holders have indeed the capacity of making choices concerning the protection of their intangible assets. The issue, therefore, is one of IP management and involves awareness of the different choices possible as well as of the resulting consequences. With this in mind, the Committee, at its third session, approved the preparation of a toolkit "for the management of intellectual property aspects of traditional knowledge documentation with a particular focus on the establishment of traditional knowledge databases."[24] Documents WIPO/GRTKF/IC/4/5 and WIPO/GRTKF/IC/5/5 provide updates on the development of this toolkit.

(b) An overview of mechanisms for positive protection of TK

22. The analysis of several documents prepared for the Committee on the experiences in protection of TK[25] shows that different mechanisms can be — and have indeed been — used to grant protection for TK. These are categorized in document WIPO/GRTKF/IC/5/12 as:

- existing IP systems applied to TK subject matter;
- adaptations and *sui generis* elements of existing IP systems to ensure their application to TK subject matter (for instance, the incorporation of TK subject matter in the IPC; and
- stand alone *sui generis* IP systems, whether for the protection of the content of TK as such, for the protection of TCEs or expressions of folklore, or for both content and expression.

Formality requirements

23. A key distinction lies between protection based on a formality requirement, and protection that arises automatically from the subject matter, without the need for specific formal steps such as registration. Protection mechanisms concerning TK may require the IP right to be formally recognized or registered, such as in the area of patents or registered trademarks, or protection may be accorded without the need for any formality, such as for copyright[26] and unregistered trade marks. The first approach has typically been used for mechanisms that protect the content of technical TK, and can be seen in a number of cases where conventional IP mechanisms have been used (such as the use of the patent system to protect innovations within traditional medicine systems), and in several countries that have

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23 Article 18(e) of the United Nations Convention to Combat Desertification (UNCCD) refers expressly to transfer of TK-related technology.

24 *Inventory of Existing Online Databases Containing Traditional Knowledge Documentation Data*, document WIPO/GRTKF/IC/3/6, of May 10, 2002, at paragraph 99.

25 See documents WIPO/GRTKF/IC/2/8, 2/9, 3/7, 3/10, 4/3, 4/7 and 5/7.

26 Copyright registration systems exist in some countries to facilitate proof of ownership

adopted a *sui generis* approach for protection of TK.[27] The second approach, protection without formalities, has been applied more to the protection of expressions of TK or TCEs (expressions of folklore), especially given the wide application of copyright and related rights systems and systems based on or derived from copyright for this subject matter.[28] However, the biodiversity law of Costa Rica, which contains some provisions on a *sui generis* regime for the protection of biodiversity-associated TK, also employs a non-formality system.[29]

24. The Committee has reviewed a range of means of using conventional IP mechanisms for the protection of TK and expressions of TK, such as copyright, patents, trademarks, geographical indications, industrial designs, and trade secrets: these are surveyed in documents WIPO/GRTKF/IC/3/10 and WIPO/GRTKF/IC/5/7. However, many participants in the Committee have highlighted that these conventional IP mechanisms may not be fully consistent or adequate for the protection of TK, given the distinctive characteristics of TK as subject matter for IP protection. Sections V and VI below explore the basis of *sui generis* systems as a complement of the use of conventional IP mechanisms. There is not necessarily a firm division between the elements of existing IP systems that are relevant to TK protection, and distinct *sui generis* TK systems. This point can be illustrated by the example of *sui generis* database protection. A compilation of data is partly recognized as a distinct object of protection under copyright law when it constitutes an intellectual creation by reason of the selection or arrangement of its contents.[30] Yet the non-original components of a database can also partly be viewed as an object of *sui generis* database protection in some countries' legal systems.[31] Indeed both legal mechanisms have been canvassed as possibly applying to collections of TK and thus affording a measure of TK protection. The relevance of copyright-based or *sui generis* database protection for traditional cultural expressions is considered in document WIPO/GRTKF/IC/5/3.

25. Alongside any distinct*sui generis* IP systems specifically created for TK as such, there can be *sui generis* elements of general IP law that may be relevant to TK subject matter. Specific *sui generis* mechanisms have been developed within general IP law to deal with particular practical needs or policy objectives relating to specific subject matter: these include specific legal provisions and practical or administrative measures. For example, *sui generis* disclosure obligations, in the form of requirements for the deposit of samples, can apply to patent procedures relating to new microorganisms.[32] Proposals have been made for specific disclosure obligations in relation to patents for inventions derived from genetic resources and associated TK.[33] In relation to TK as such, the development of distinct classes or sub-classes for TK in the International Patent Classification could be characterized as a *sui generis*

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27 Document WIPO/GRTKF/IC/5/7 contains a survey of national experiences of TK protection.

28 See *Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore*, document WIPO/GRTKF/IC/4/3, of October 20, 2002, at paragraphs 71-73.

29 Law No. 7.788, of April 23, 1998, Article 82. The complete text of Law No. 7, 788 can be found at www.prodiversitas.bioetica.org/doc25.htm.

30 In accordance with TRIPS Article 10.2, and the WIPO Copyright Treaty, Article 5

31 See, for example, the EU Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20)).

32 In accordance with the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure.

33 See document WIPO/GRTKF/IC/5/10.

element of an existing system to facilitate defensive protection of TK.[34] The extension of performers' rights to those who perform 'expressions of folklore'[35] captures *sui generis* TK-related subject matter within a broad IP system (see document WIPO/GRTKF/IC/5/3). To some extent, therefore, the Committee may need to explore or define the boundary or interaction between relevant *sui generis* elements of existing IP systems that have the effect of protecting TK to some extent, on the one hand; and the elements of distinct *sui generis* systems specifically for TK protection on the other hand.

(c) The national or international dimension of TK protection

26. Protection of IP is territorial in nature, being based on national or regional laws and protection systems, even when it is informal and does not depend on registration. Nonetheless, the policy interest in IP protection, and protection of TK in particular, has a strong international dimension. Since IP is an intangible asset that is readily communicated and reproduced, it can cross national borders with no barriers other than legal protection. The policy concerns about the IP protection of TK generally arise when it is removed from its traditional context, and frequently when it is transmitted to or used in different jurisdictions altogether. Any national legal system that protects TK in a distinctive *sui generis* way, apart from established IP rights, may need to interact with IP systems in other countries. It is therefore a key legal and practical issue how to achieve international recognition of *sui generis* rights granted under national systems, or to ensure effective articulation of national systems. Therefore, even seeking to identify elements of possible *sui generis* systems raises the question of whether the system is to be characterized predominantly at the national or international level. It is possible to envisage the future work of the Committee focusing on systems of protection at the national level, with a view subsequently to distilling out more general principles that could be expressed in an international framework; or it could seek directly to express what basic elements or principles would be sought in an international framework, whether indicative, illustrative or more formal in character. An additional, important issue is how to make the transition from national protection to international protection where there is interest in taking this step. It is possible that countries may prefer to move on a case by case approach, establishing a system of recognition of rights granted by other countries to their own citizens when these are willing to reciprocate. The *sui generis* law of Panama is an example of this approach.[36] But it is also possible to take a regional or multilateral level, under which contracting countries accept some rules on articulation of national protection systems and, eventually, minimum, harmonized standards of protection. How the principles of national treatment and most-favoured-nation would be interpreted and applied then becomes an issue.

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[34] See paragraphs 39-40, document IPC/CE/31/8, Report of the Committee of Experts, Special Union for the International Patent Classification (IPC Union), Thirty-First Session, Geneva, February 25 to March 1, 2002.

[35] WIPO Performances and Phonograms Treaty, Article 2(a).

[36] See Law No. 20, of June 26, 2000, Article 25:

> "For the effects of the protection, use and marketing of the intellectual property collective rights of the indigenous communities contained in this Law, the artistic and traditional expressions of other countries will have the same benefits set forth hereon, whenever they are made by means of reciprocal international agreements with these countries."

The complete text of this law can be found in Annex document WIPO/GRTKF/IC/5/INF/2.

(d) Objectives of TK protection

27. The form of protection of TK, whether through existing IP mechanisms, through adapted or *sui generis* elements of existing forms of IP, or through a distinct *sui generis* system, will depend heavily on why the TK is being protected – what objective the protection of TK is intended to serve. Existing IP systems have been used for diverse forms of TK-related goals, for instance,

- to safeguard against third party claims of IP rights over TK subject matter,
- to protect TK subject matter against unauthorized disclosure or use, to protect distinctive TK related commercial products,
- to prevent culturally offensive or inappropriate use of TK material,
- to license and control the use of TK-related cultural expressions, and
- to license aspects of TK for use in third-party commercial products.

28. Normally, the aim of protection will be a mix of some of these goals, with the emphasis varying depending on the specific material to be protected – in particular, defensive and positive protection may both be required. Stand-alone *sui generis* protection of TK is likely to focus not on defensive protection alone, but to create a positive right over the protected subject matter. Even so, it will still raise the question of what positive rights are intended, and what acts by other parties they are intended to constrain, and whether the protection is linked with other specific policy objectives, such as the active protection of cultural heritage, the suppression of unfair commercial practices, the equitable management of genetic resources, and conservation of biodiversity. The debate about IP protection of TK may be clarified with closer attention to the specific needs and objectives of those seeking to protect their TK. But, at the same time, there are some common aspects of IP systems that are applicable to TK protection, and may help to clarify why in general IP-style protection may be valuable for TK.

(e) The reasons for IP protection of TK

29. Possibly because of the diversity of objectives for TK protection that have been raised in debate, there is some uncertainty about whether TK falls into the same general category as other intellectual creations, such as inventions and literary and artistic works, that are protected by specific IP rights. The background question is to what extent is a *sui generis* system to be considered as an IP system at all, and to what extent does it operate apart from the general IP framework? In turn, this flows into potential unease about the apparent commercial or economic focus of the IP system, which can seem to be in tension with the more diverse and culturally based needs and expectations of holders of TK. In most cases (but not all), TK is not originally developed with a commercial goal and is not intended to be commercialized in its traditional form. Often, in fact, it is unauthorized commercial use of TK by other parties that triggers concerns that TK should be given IP protection, rather than an active desire on the part of TK holders to commercialize their TK.

30. There are accordingly concerns that TK should not be commodified as the subject matter of intellectual property, and reduced and simplified to a set of economic rights. To apply IP protection could be seen to diminish the cultural and spiritual value of TK, or even worse, distort its essential nature and transform it into a tradable commodity. From another perspective, there have been suggestions that there is no economic justification for the costs of devising and implementing a new legal regime for the protection of TK. For instance, the incentive argument for IP protection may not apply to TK protection, which almost by

definition has been developed by communities on their own initiative as a response to their own needs and interests. However, such analyses may overlook the adaptable nature and full range of IP mechanisms.

31. The definition of 'intellectual property' has generally been cast in broad terms: for instance in the 1967 Convention Establishing the World Intellectual Property Organization, it is defined in terms of specific IP rights (such as rights relating to inventions and to trademarks), but also as including "all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."[37] Yet there is a common quality to the specific rights established under IP systems. Property rights are not indefinite, with the wide-ranging, variable and abstract qualities of human knowledge. Property rights are affirmed against third parties: in essence, they entitle the owner to prohibit trespassing. Given the intangible nature of their subject matter, IP rights are defined by the boundaries that are set around the claimed subject matter, and are asserted by preventing others from using or reproducing the protected subject matter.

32. In considering the IP protection of TK subject matter, it is important to distinguish the IP right, as such, from the underlying material it gives protection to. A body of TK is inevitably more comprehensive, diverse and integral to a community's life and heritage than any specific scheme of IP rights that provide legal protection for the TK. Therefore, to identify certain IP rights (whether general IP rights or *sui generis*) as applicable to the protection of some aspects of TK does not diminish or reduce the TK itself, nor the cultural heritage which creates and sustains it. The fact that copyright protection may apply to a song cycle or a traditional narrative does not diminish the cultural values of the protected material; nor does it create an expectation that the material would be commercialized in any particular way.

33. Hence, the fact that IP rights may be applied to TK subject matter need not impact the way in which the TK is created and used by the originating community. In most cases, the use IP owners make of the protected material is irrelevant to how the right is defined: whether or not the protected material is seen as a cultural or a commercial asset, or both, the IP right determines how other, third parties may (or may not) make of those assets. This characteristic of IP rights makes them useful even for those who do not want to make commercial use of their assets, but who want to prevent others from doing so. For example, authors' moral rights – rights of integrity and of attribution – do not have a commercial nature, and indeed are enjoyed independently of authors' economic rights.[38] Nonetheless, they function as part of an IP system since exercising these rights (to restrain such acts as distortion, mutilation or other modification of the work or other derogatory action) requires exactly the same enforcement tools trade-related IP rights. In the same vein, as far as TK is an expression of cultural identity, IP enforcement tools are necessary to protect it against distortion or other derogatory actions, even for those TK holders who do not wish to put it in the channels of commerce.

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[37] Article 2 of the WIPO Convention provides that "'intellectual property' shall include the rights relating to: literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."

[38] Berne Convention on the Protection of Literary and Artistic Works, Article 6 *bis*.

34. IP protection, therefore, does not 'commodify' TK *per se*: to the contrary, one immediate consequence can be to empower TK holders against the distorting use of elements of their identity, or against unauthorized commodification of their TK. TK holders may, if they wish so, not only to refrain from giving a commercial dimension to their TK, but they may also prevent others from doing so. On the other hand, an IP regime will be of crucial interest for those TK holders who have the legitimate aspiration of 'commodifying' their knowledge or at least certain selected parts of it they choose to commercialize. Hence, the first rationale for IP protection of TK is to enable TK holders to preserve their identity against any use they do not wish their TK to be given.

35. The second reason for using IP to protect TK has a more legal dimension: a clear, transparent and effective system of TK protection increases legal security and predictability to the benefit not only of TK holders, but also of society as a whole, including firms and research institutions who are potential partners of TK holders. These benefits go beyond the promotion of innovation as such, given the argument that IP forms of protection of TK are unnecessary since the innovation will have taken place without IP protection. Document WIPO/GRTKF/IC/3/7 discusses this rationale for IP protection of TK:

> "On the other hand, it is true that traditional knowledge has been developed without the need for a formal system of intellectual property protection. In this sense, it can be said that intellectual property is not necessary to promote its development any further. However, the purpose of intellectual property, and in particular of patents, plant variety certificates and trade secrets, is not exclusively the promotion of inventive activities. If it were, intellectual property would have no purpose whatsoever in countries of centrally planned economies or in those fields where the basic inventive activities are carried out by the government or by private institutions with public funding (biotechnology, for example). Transparent and secure property rights in knowledge have an extremely important role in reducing transaction costs as far as the transfer of technology is concerned. Patents, for example, have a crucial role to play in the biotechnology area, where the governments or the institutions that have promoted the inventions need to transfer public-funded inventions to the market. For that to happen in a transparent and secure way, rights and obligations must be clearly defined and attributed. For that to happen, a private mechanism of appropriation is of the essence. The same concept applies to traditional knowledge. Intellectual property protection of traditional knowledge would establish clear rules on the private appropriation by traditional communities of their own expressions of culture (including technical knowledge), thus reducing the enormous uncertainty that today involves all activities of bioprospection by businesses and research institutions."

36. Some examples of increased transaction costs arising from the lack of a transparent system for the protection of TK can be found in the current uncertainty in the access (or lack thereof) to the biodiversity and related TK within a number of countries which can lead to uncertainty and loss of confidence in dealings with potential commercial and research partners — to the loss not only of foreign entities but also, and in particular, of national institutions, which may lose an opportunity to leverage access to foreign technology, as well as to the TK holders themselves, who may be deprived of possible financial and non-financial benefits. Another example is the current debate on the requirement to disclose prior informed consent in patent applications for inventions that may have derived from or used elements of TK. The relevance of such a requirement would be greatly diminished (as far as TK is concerned) if TK were the subject matter of property rights. Under an IP regime, TK holders

would be able to enforce their rights against any misuse of their TK, whether it was in the context of a patent application or direct commercial use.

37. A third potential rationale for IP protection of TK concerns economic development and poverty alleviation: if the communities so wished, the formalization and recording of traditional communities' intangible assets would transform them into capital, thus facilitating the establishment of commercial ventures within traditional communities. Many traditional communities that live in apparent poverty are actually rich in knowledge — but their knowledge, not being the subject of formal property titles, is prone to commercial misappropriation by others. Furthermore, once recognized through titles, TK could be used as collateral security for giving traditional communities facilitated access to credit. This would apply in those cases where traditional communities actively chose to commercialize selected elements of their TK. For instance, this would be helpful in promoting the development of self-sustaining enterprises based on TK-related handicrafts, where protection of TK may help both to strengthen the enterprises' access to markets, but also secure access to the capital needed to build up community-based enterprises. While there is little commercial experience in other aspects of TK, there are possibilities in such areas as traditional or complementary medicine, and other useful technologies, as well as distinctive agricultural and food products.

38. The fourth rationale for IP-related protection of TK concerns international trade relations, and was discussed in WIPO document WIPO/RT/LDC/1/14, *Protection of Traditional Knowledge: A Global Intellectual Property Issue*.[39] One general argument for international cooperation on IP protection has been that its absence in foreign countries leads to an unfair advantage for local manufacturers, since they do not need to compensate the IP right holder, or to contribute to the costs of research and development. Other factors being equal, foreign IP right owners will be in disadvantage vis-à-vis their local imitators, and therefore the lack of IP protection amounts to non-tariff barriers to trade. Just as this applies to the pharmaceutical, software and entertainment industries, it would apply to IP-related TK and the commercial interests of traditional communities that make use of their TK in their economic life, especially when they are seeking to trade beyond their community. Similar considerations apply when TK holders see their interests not in direct commercial terms, but in terms of restraining other people's unacceptable commercial practices involving their TK, such as misleading or deceptive behavior.

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[39] Document WIPO/RT/LDC/1/14, presented at the High Level Interregional Roundtable on Intellectual property for the Least Developed Countries (LDCs), Geneva, September 30, 1999:
"As an outcome of the Uruguay Round negotiations, many developing and least developed countries have accepted the obligation to establish high standards of intellectual property protection, as a means of promoting free trade. It may be argued that biodiversity, and the traditional knowledge associated with using it in a sustainable manner, are a comparative advantage of those least developed countries that are biodiversity-rich, enabling them to participate more effectively in global markets and thus rise above the current levels of poverty and deprivation. This is an example of how protection of traditional knowledge at the national and international levels may be seen as a potentially powerful tool for advancing the integration of least developed countries into the global economy."
Id. paragraph 10.
The intrinsically trade-related dimension of TK has led to its inclusion in the work programme of the TRIPS Council (see the Ministerial Declaration adopted at the fourth session of the WTO Ministerial Conference, at Doha, WTO document WT/MIN(01)/DEC/1, of November 20, 2001, at paragraph 19).

39. Each of these rationales for the IP protection of TK subject-matter could potentially apply equally to the use of existing general IP mechanisms, to the use of adapted or extended forms of existing IP rights, and to the use of *sui generis* IP mechanisms specifically designed to protect TK. It is crucial that IP protection of TK should be seen as a means to an end, not as an end in itself, and the choice of IP mechanism should not pre-judge the concerns and interests of TK holders. The aim, rather, is to strengthen the choices available to TK holders, including to restrain unwanted or unauthorized commercialization of their TK by others, or to ensure that any commercialisation is in accordance with their wishes and interests.

IV. APPROACHES TO DEFINITION OF TK

40. As noted above, the Committee's discussions have highlighted how the way one defines TK inevitably depends on what kind of protection is intended. What is meant by "protection of TK" will, in turn, mean different things depending on the policy goal that is being addressed: for example, is the TK protected in the sense of being preserved intact for others to use, or is it to be protected against the unauthorized use by others? TK can be 'protected' in a range of legal ways, such as through contracts and licenses, or national laws governing such issues as environmental protection, cultural heritage or the interests of Indigenous people. In each case, a different concept of TK may correspond to each different notion of protection, and the formal legal definitions of TK vary accordingly.[40] Protection of TK in an intellectual property sense (the subject of this paper) would normally entail the recognition of specific rights in the TK itself, and the capacity to restrain others from using the protected knowledge without authorization. This may require some precision or clarity of the scope of the rights that arise from the TK. A very broad, inclusive definition of TK may be useful for general descriptive purposes, but may not serve as an effective basis for a specific legal protection.

41. As document WIPO/GRTKF/IC/5/12 discusses, TK-related IP protection may be applied to three general forms of subject matter:

(a) Protection extended to the content, substance or idea of knowledge and culture (such as traditional know-how about the medicinal use of a plant, or traditional ecological management practices) – corresponding roughly to the subject matter of patents, utility models and know-how or trade secrets;

(b) Protection extended to the form, expression or representation of traditional cultures (such as a traditional song, performance, oral narrative or graphic design) – corresponding roughly to the subject matter of copyright and performer's rights and rights in industrial and textile designs; and

(c) Protection extended to the reputation and distinctive character of signs, symbols, indications, patterns and styles associated with traditional cultures, including the suppression of misleading, deceptive and offensive use of this subject matter – corresponding roughly to the subject matter of trademarks and geographical indications, as well as specific protection for material such as the names of IGOs, hallmarks and national symbols.[41]

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[40] See the survey in the Annex of document WIPO/GRTKF/IC/3/9.

[41] See document WIPO/GRTKF/IC/5/12, paragraph 41.

The nature of the protection intended will clearly influence the way the subject matter is defined intended for protection, and thus the definition of TK for the purposes of its IP protection should take account of the way it is defined. This document concentrates on the form of protection of TK *stricto sensu*, which has been identified as:

> the content or substance of traditional know-how, skills, practices and learning, while recognizing that this content or substance may be considered integral with traditional ways of expressing the knowledge and the traditional context in which the knowledge is developed, preserved and transmitted. This reflects the view that TK must refer to 'knowledge' in a general sense, but knowledge with a specifically traditional character. Protection would apply to the knowledge as such, and restrain the unauthorized use of the knowledge; this could include unauthorized disclosure of secret or sacred TK.[42]

42. Discussion of the IP protection of TK requires greater understanding of the concept of TK that is the very subject of protection. On the other hand, the very diversity of TK, and the degree to which it is integral to the fabric of traditional communities and distinct social and cultural traditions, mean that a single, rigorous definition may exclude much important subject matter, and may not take account of the important contribution of local law and customs in determining what is defined as TK and how TK should be protected. A key question, too, is the relationship between the general concept of 'traditional knowledge,' which – as a distinct, stand-alone concept, at least – is relatively new in international discussion on IP issues, and the terms 'folklore' and 'traditional cultural expressions,' which are more specific in their application and represent a longer tradition, both at the level of international IP discussion and in national legal systems.

43. This section aims to clarify the definition of TK by:

- discussing the relationship between an inclusive, descriptive definition of TK, and a definition that is relevant for the subject matter of specific legal protection;
- distinguishing between TK and folklore/TCEs as the subject of protection;
- considering the role of definitions in international instruments on IP; and
- considering the relationship between a definition of protected subject matter with the objectives of protection

(a) Approaches to defining core IP concepts

44. Discussion of IP-related definitions of TK may be assisted by consideration of how core concepts are defined and applied in other IP systems. International harmonization, standard-setting and cooperation across the field of IP have not, overall, been dependent on the determination of definitive, exhaustive definitions of the subject matter of protection. There has been a tendency to leave specific determinations of the boundaries of protectable subject matter up to domestic authorities, and for terminology at the international level to be used more to express a common policy direction. This applies equally whether the legal instrument under consideration is binding or non-binding, an expression of principles, a set of guidelines, or firm rules that aim at coordinating or harmonizing national systems of protection.

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[42] Document WIPO/GRTKF/IC/5/12, paragraph 44.

45. Accordingly, a general definition of the subject matter of IP protection, especially at the international level, can be distinguished from the more precise tests that are developed and applied case-by-case at the national (or regional) level, using interpretative principles based in domestic law. In some instances, individual objects of IP-related protection can be defined in direct and explicit terms at the international level (for example, State emblems and official signs notified under the Paris Convention[43]), but for most categories of IP protection, the approach taken to defining subject matter is more general and remains open to distinct interpretation and application at the national level.

46. The way relevant IP subject matter is identified may also be influenced by the policy objectives of the legal instrument. International instruments on IP protection have addressed various objectives, such as:

- creation of reciprocal rights, involving mutual recognition of foreign nationals' rights to protection under national systems, effectively a guarantee of access for foreign nationals to the national IP system in line with the applicable national standards;
- establishment of agreed minimum standards for protection, so that there is a guarantee of a certain level of protection for eligible subject matter; and
- coordination of specific protection, so that there is convergence in the scope of specific IP rights.

47. The degree of precision in the definition of protected subject matter can vary according to which of these objectives applies. For instance, the Paris Convention defines 'industrial property' in explicitly broad terms[44] and does not define specific terms such as 'patents' and 'trademarks.' Yet this is not a barrier to the effective operation of the international instrument, precisely because the protection which it coordinates or harmonizes still has its operational effect in domestic law, and the specific rights granted in different jurisdictions are intended to be independent of one another.[45] Hence the need for case-by-case precision in the use of a definition may only arise at the domestic level. Even though it may be considered desirable to promote convergence and predictability in the operation of national IP systems, an international instrument need not aim to ensure that different national systems grant individual IP rights that are identical in scope, as an end in itself.

48. The definition of IP-related subject matter may also be expressed very generally when the definition does not determine or delimit the actual scope of protection to be granted under law. It is possible to define relevant subject matter in broad terms, and then separately to specify what distinct subset or portion of that material is actually eligible for legal protection. In other words, defining subject matter that is generally relevant and defining the exact scope of protected subject matter can be separate conceptual steps. The second step, of determining exactly which portion of the general subject matter is to be protected, can be taken by applying specific eligibility criteria, by making explicit exclusions to the scope of protectable

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[43] Following notification of such material under Article 6*ter* of the Paris Convention for the Protection of Industrial Property.

[44] Article 1(3) provides that: 'Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.'

[45] See, for instance, Articles 4*bis* and 6(3) of the Paris Convention.

subject matter, or by referring to specific categories of subject matter. Commonly, some or all of these approaches are adopted in the same legal instrument.

49. Hence 'invention,' the object of patent protection in most countries,[46] tends to be defined broadly in legal instruments (and is not defined at all in key international instruments such as the Paris Convention and the WTO TRIPS Agreement).[47] Whether protection is actually to be afforded under patent law depends on whether the claims are directed to an invention broadly defined, and on whether the claims also specifically comply with the criteria of novelty, non-obviousness and utility.[48] Some inventions can also be excluded for policy reasons, such as inventions which would otherwise be eligible for patent protection but are deemed to be contrary to *ordre public.* Specific provisions can be made to clarify that certain technologies are included within or are excluded from the definition of patentable subject matter, setting aside any interpretative uncertainty.

50. Similarly, the general object of copyright protection ('literary and artistic works') is defined in broad terms in Article 2(1) of the Berne Convention (it 'shall include every production in the literary, scientific and artistic domain….'), but the actual scope of protected subject matter is defined by specific conditions, such as the need for originality and for material fixation; and it is possible to specify that certain subject matter is deemed to be protectable (such as the requirement that computer programs be protected as literary works[49]), thus confirming how the general definition is applied in that specific case.

51. In IP systems, there is often a dynamic linkage between the definition of subject matter and the actual scope of protection, so that the way the definition is applied is guided by the policy rationale for the particular IP protection. Indeed, in some jurisdictions it can be more instructive to look at decided case law than at the formal statutory definition to get a sense of the actual scope of the definition in practice. The definition of relevant subject matter is often informed and molded by consideration of the policy objectives of the IP law in question, and so an operational definition needs to take account of the policy context in which the subject matter is defined and protected. For instance, trademark rights are typically defined with reference to the way a sign is used by commercial undertakings and is perceived in the marketplace, rather than its use or perception in non-commercial contexts, because trademark law generally aims to promote fair competition between traders and to prevent confusion or deception of consumers. The sign generally needs to be used in a commercial context to function as a trademark. If the same sign were used in a different, non-commercial context it may not be subject to trademark law, since the policy focus is on the commercial sphere.

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46 In the United States, discoveries, under some strict circumstances, are also patent subject matter. See 35 U.S.C. §§ 100(a) and 101.

47 See document WIPO/GRTKF/IC/1/3, paragraph 65.

48 To some extent, it could be argued that these criteria are overlapping with the inherent notion of 'invention.' However, it is possible for an invention, so defined, to fail to meet the criteria, for instance for want of novelty or utility. The reverse engineering of a technique that the emulator ignored had been previously disclosed is an invention, in spite of not being new. The only criterion that is actually overlapping with the notion of 'invention' is non-obviousness. There are no obvious inventions. But there are inventions that are more inventive than others. In other words, in contrast with the two other criteria, non-obviousness is a relative one. Patentability depends on the amount of level of inventiveness. If correctly worded, a statutory provision on patentability should actually read: "patents shall be available for any invention provided that it is new, *involves a sufficient inventive step* and is useful."

49 WIPO Copyright Treaty, Article 4 and TRIPS Agreement, Article 10.1.

52. What does this mean for definitions of 'traditional knowledge' and related terms? Quite apart from the question of whether a distinct set of underlying legal concepts is required for TK protection, the approach or the methodology used in defining subject matter in other areas of IP may provide useful parallels when taking the step of defining TK-related subject matter. For instance, the approaches taken to terminology in other areas of IP suggest that:

(i) while illustrative or descriptive characterizations of 'traditional knowledge' may be developed in isolation to promote discussion, analysis and debate, it may only be possible (or desirable) to settle on a particular definition in the context of a specific legal instrument and with a defined policy goal;

(ii) the degree of precision required in a definition may depend on the level and extent of harmonization and uniformity in national laws that is expected to result from an international legal instrument;

(iii) clarity about the policy objectives of the legal instrument and the kind of protection that is intended may be a necessary ingredient for a firm definition of 'traditional knowledge:' for instance, does the legal instrument concern defensive or positive protection; is it concerned with active protection of cultural heritage or simply suppression of commercial misuse; and is it intended additionally to promote a distinct public policy objective, such as equitable management of genetic resources and conservation of biodiversity?

(iv) it could be in keeping with international practice for a definition to be broad and open-ended, with greater precision applying at the national level or in the scope of specific areas of protection; or, at least, the absence of a single, comprehensive and exhaustive definition need not be an obstacle to the international coordination or harmonization of domestic legal systems;

(v) a definition of 'traditional knowledge' could be expressed in a general or indeterminate way, while the actual scope of legal protection may be separately defined as a distinct step, taking into account the nature and policy orientation of the protection, for instance:

- with reference to specific conditions (e.g. that it not already be in the public domain, or that it be traditional knowledge associated with *in situ* biodiversity conservation)
- by excluding some areas of subject matter (e.g. secret or sacred traditional knowledge may be excluded from a system that provides protection by publishing details of traditional knowledge)
- by specifying that some particular subject matter is deemed to fall within the scope of protection (e.g. clarifying that unfixed TK is included in the definition).

53. A relatively general approach to definition may be especially called for in relation to traditional knowledge as the subject matter of protection, in contrast to the areas of intellectual property already surveyed here. TK subject matter is particularly dynamic and variable, and more likely to be shaped by local, cultural factors than other forms of IP. Moreover, there have been calls in the work of the Committee for there to be some recognition of customary law[50] as an element in the definition and protection of TK. If there

[50] See document WIPO/GRTKF/IC/2/16, at paragraphs 90, 94, 100, 108, 152

is to be reflection of customary law in the characterization of traditional knowledge, this would necessarily involve a more general form of definition at the international level, given the diverse and distinct quality of customary laws; equally, if weight is to be given to local cultural factors, this could also entail a general umbrella definition at an international level. This general approach was foreshadowed in document WIPO/GRTKF/IC/1/3 (itself echoing comments in the 'WIPO Report on Intellectual Property Needs and Expectations of Traditional Knowledge Holders'[51]):

> "Given this highly diverse and dynamic nature of traditional knowledge it may not be possible to develop a singular and exclusive definition of the term. However, such a singular definition may not be necessary in order to delimit the scope of subject matter for which protection is sought. This approach has been taken in a number of international instruments in the field of intellectual property."[52]

(b) National approaches to defining TK

54. This section considers the various approaches taken to defining traditional knowledge in national legal systems. At its third session, the Committee encouraged the notification of *sui generis* laws on TK protection.[53] Four *sui generis* statutes for TK protection enacted by Committee Members have been made available to the Committee so far, and these illustrate the diversity of possible approaches to defining TK. These are discussed in turn below; this discussion is not intended to interpret or analyse the legal provisions in themselves, nor to assess the value or validity of any particular approach, but simply to use these provisions as the basis for discussion of general issues concerning the definition of 'traditional knowledge.' The full text of the four laws is provided in document WIPO/GRTKF/IC/INF/2.

55. Article 7(II) of the Brazilian statute (Provisional Measure No. 2.186-16, of August 23, 2001) defines associated TK as follows:

> "Associated traditional knowledge: information or individual or collective practices of an indigenous or local community having real or potential value and associated with the genetic heritage."

56. The first impression is that the scope of protection of TK — and, consequently, the very concept of TK as well — is limited to knowledge that is associated to the Brazilian genetic heritage, which corresponds, more or less, to the genetic information contained in biological diversity. As noted above, a general notion of TK might include not only knowledge itself, but also the expressions of the traditional knowledge, such as verbal or musical expressions, expressions by action (such as dances), whether or not reduced to a material form, and tangible expressions (such as drawings, paintings, carvings), musical instruments and

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51 WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* (WIPO, 2001)

52 See document WIPO/GRTKF/IC/1/3, paragraph 65

53 See *Report* of the third session, document WIPO/GRTKF/IC/3/17, at paragraphs 211 and 309. The statutes of the four countries (Brazil, Panama, Peru and Portugal) can be found in Annex III to document WIPO/GRTKF/IC/INF/2.

architectural forms.[54] Those traditional expressions may be (and are frequently) associated with the physical environment of Indigenous peoples and traditional communities, and therefore are not easily separable from the knowledge they express. However, this particular definition provides that "associated traditional knowledge" consists of "information or individual or collective practices." Besides, the Brazilian statute deals basically with access to genetic resources. This suggests that the protected "associated traditional knowledge" is mainly technical knowledge about the uses of genetic resources. It may be, however, that the definition could extend to cover the situation when that knowledge is conveyed through TCEs/expressions of folklore. The definition above contains two additional elements: the requirement that the knowledge be either created or in control of indigenous and local communities; and the stipulation that the knowledge should have real or potential value, which is relevant to the entitlement of TK holders to sharing of benefits, even if the value of the associated TK is to be developed or realized at a later stage.

57. The *sui generis* statute of Panama does not attempt an exhaustive definition of TK.[55] Instead, it lists some examples of TK subject matter and identifies a few elements that make such subject matter eligible for legal protection. TK, therefore, may consist of "inventions, models, drawings and designs, innovations contained in pictures, figures, symbols, illustrations, old carved stones, and others; likewise, the cultural elements of […] history, music, art and traditional expressions." The scope of this concept is, therefore, very broad, and appears to comprise "technical" TK as well as expressions of TK.[56] This law has two additional elements: first, only TK that is owned by indigenous communities shall be protected; second, TK must be "capable of commercial use." TK that is not susceptible of commercial use may eventually be protected under other provisions of Panama's legislation, but not under the *sui generis* system of registration and protection of Law No. 20.

58. Article 2(b) of Law No. 27811 of Peru defines "collective knowledge" as

> "the accumulated, transgenerational knowledge evolved by indigenous peoples and communities concerning the properties, uses and characteristics of biological diversity."

The scope of Peru's statute is thus limited to TK that is (a) collective; (b) accumulated and transgenerational; (c) created by indigenous peoples and communities; (d) concerning properties, uses and characteristics of biodiversity components. This definition restricts the scope of protected material according to its subject matter (relating to biological diversity), its source or origin (evolved by indigenous peoples and communities), and its relationship with tradition (TK must be accumulated and transgenerational). This link with a knowledge tradition need not imply that the definition is limited only to TK that has been created several generations ago and has already been transmitted from generation to generation. If so, the law would deny protection to TK that will be created by indigenous communities in the future. Rather, it suggests that TK is knowledge that is (or has been, or will be) created according to

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54 See WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.

55 See Law No. 20, of June 26, 2000, Article 1.1.

56 However, Article 3 of Law No. 20, which deals with "Objects Susceptible of Protection" leans very clearly to a much narrower approach, and focuses essentially on handicrafts and associated expressions of folklore. Undoubtedly, handicrafts have a technical substract, and the associated techniques must indeed be described as a condition for their registration with the authority in charge.

the traditions of a community. Thus, the words "accumulated and transgenerational" may essentially refer to subject matter created in the past,[57] but they may also link new (or future) knowledge to the transgenerational culture of the community, construing new insights as further accumulation of that tradition. Traditions are the thread of Ariadne that links today's TK to the past and future of Indigenous peoples and traditional communities.

59. Article 3(1) of Portugal's Decree-Law No. 118/2002 contains a more detailed definition of TK:

> "Traditional knowledge is all the intangible elements associated to the commercial or industrial use of local varieties and other endogenous material developed by local communities, collectively or individually, in a non-systematic manner and that are inserted in the cultural and spiritual traditions of those communities, including, but not limited to, knowledge relating to methods, processes, products and denominations that are applicable in agriculture, food and industrial activities in general, including handicrafts, trade and services, informally associated to the use and preservation of local varieties and other endogenous and spontaneous material that is covered by the present law."

This definition is limited to TK that is associated to local plant varieties (both wild varieties and landraces). Within that relatively narrow technical area, TK may consist of a wide range of knowledge. The provision above is not exhaustive as the expression "including, but not limited to" indicates. The other elements designated for identifying protectable TK are: TK may be either of a collective or an individual nature; but its creation must be "traditional" in the sense that it must be (i) non-systematic, and (ii) inserted in the cultural and spiritual tradition of the traditional communities. In other words, in spite of protecting TK owned by individuals, TK must have had a collective (or community-related) origin. Whether the individual TK may have kept its links (the "thread of Ariadne") with the cultural traditions of the community from which it originated is a matter to be decided under customary law.

60. The reference to the non-systematic manner of creating TK, as mentioned in the Portuguese law, has been the subject of the following analysis in document WIPO/GRTKF/IC/4/8:

> "The fact that TK is created in a distinctively cultural context also gives rise to another important characteristic: in essence, to understand the full nature of TK or simply even to record or define it, it may be necessary to understand the cultural influences that shape it. Whether or not TK is produced within a formal or systematic tradition, or in a more informal or ad hoc context, it tends to be developed in a way that is closely related to the immediate environment in which traditional communities dwell, and to respond to the changing situation of that community. In that regard, it can have an empirical or trial-and-error basis. Yet TK may be developed in accordance with systems of knowledge, and be incorporated into systematic concepts and beliefs. Culturally-based rules may apply to the way innovation proceeds. Yet the way TK is created may appear from an external or universal perspective to be non-systematic or unmethodical, partly because the rules or system governing its creation can be passed on in an informal or cultural manner, partly because the systematic element is not explicitly articulated, and

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[57] The law of Peru establishes some criteria for assessing the "novelty requirement." See *infra* paragraphs 87 *et seq.*.

> partly because the process leading to the creation of TK may not be formally documented in the way that much scientific and technological information is recorded. The apparent non-systematic manner of creation of TK does not diminish its cultural value or its value from the point of view of technical benefit, and raises the question of how to record or define its relationship with the culturally-specific knowledge system, set of rules or guidelines, or set of background beliefs which help shape it. As with the "tradition-based" characteristic, the apparent "non-formal" characteristic leads to particular emphasis on the context in which is created, and the potential need for elements of this cultural context to be considered along with the knowledge *per se*."[58]

(c) *Possibilities for an inclusive working definition of TK*

61. The WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) contains a definition of TK that uses the two approaches taken by the statutes above referred to: on the one hand, a list of possible subject matters if provided; and, on the other hand, some elements necessary for TK' characterization are indicated. The definition is the following:

> "WIPO currently uses the term "traditional knowledge" to refer to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. "Tradition-based" refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; "expressions of folklore" in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties."[59]

This working definition was cast deliberately very broadly, fittingly for a fact-finding and consultative process. Notably, it includes both the knowledge itself, and expressions of traditional culture or folklore. The stipulation that knowledge be 'tradition-based' is explained with reference in particular to transgenerational transmission (similar to the definition in the Peruvian law cited above) and a link to a particular community or territory. It recognises, too, that knowledge will evolve in response to the environment, and that this can be part of its traditional characteristic.

62. This working definition of traditional knowledge may need to be focussed or refined for specific forms of international cooperation. In particular, the Committee has maintained a distinction between TK *stricto sensu*, and traditional cultural expressions, reflecting the different modes of protection and different policy objectives that may apply to such subject

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[58] At paragraph 30.

[59] *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) (WIPO Publication 768E), at 25.

matter. As has been noted, how a working definition of TK is to be framed will be influenced by its practical purpose. For instance, when the definition forms part of a TK protection system that gives effect to the Convention on Biological Diversity (see the introductory discussion in Section III above), the concept of TK will be naturally adapted to that purpose. Thus the laws of Brazil, Peru and Portugal variously limit the definition of TK with reference to genetic heritage, biological diversity or local plant varieties, and focus on technical TK in the strict sense of actual knowledge rather than the form of its expression. In contrast, the law of Panama is much broader, and comprises both technical TK and expressions of TK.

63. However, a crucial question has been lingering over the debate on TK and, in particular, on its legal protection: is it possible to separate technical TK from expressions of culture, or expressions of folklore? In previous documents prepared for the Committee, the Secretariat visited already this issue more than once. For example, in document WIPO/GRTKF/IC/3/10, the Secretariat said that:

> "[…] [T]he separate treatment of "expressions of folklore" from other forms of traditional knowledge may be artificial and not in accordance with reality. To give one example only. The *amauti*, referred to in Canada's response to the Questionnaire, is an Inuit woman's parka that is designed with a large hood and a pouch in which a child can be carried while allowing the woman's hands to remain free. A child can be nursed and tended without leaving the warmth of the *amauti*. The parka was made using traditional skills and know-how, from caribou hair and sealskin. The *amauti* reflects the practical and functional adaptations of the Inuit to their environment. It is thus a product of biodiversity-related traditional knowledge. Today, Inuit women are attempting to promote commercial sales of handmade *amautis* in order to conserve traditional skills and knowledge while providing a source of income and a measure of financial independence. It is also intrinsically linked to Inuit culture. Inuit women are concerned about the misappropriation and loss of cultural heritage. They fear that if they lack effective legal tools to protect their works, they will be denied appropriate credit and compensation, they will lose control over traditional designs and motifs, and their market will be usurped by mass-produced articles."[60]

64. In another document, WIPO/GRTKF/IC/4/8, the Secretariat illustrated the encompassing notion of TK with a fable:

> "A short fable may help illustrate the nature of TK and the availability of existing mechanisms of intellectual property that fit its characteristics. Let us imagine that a member of an Amazon tribe does not feel well and requests the *pajé*'s medical services (*pajé* is the tupi-guarani word for shaman). The shaman, after examining the patient, will go to his garden (many shamans in the Amazon rain forest are plant breeders indeed[61]) and collect some leaves, seeds and fruits from different plants. Mixing those materials according to a method only he knows, he prepares a potion according to a recipe of which he is the sole holder. While preparing the potion and, afterwards, while administering it to the patient (according to a dosage he will likewise prescribe), the *pajé* prays to the gods of the forest and performs a religious dance. He may also inhale

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60 *Final Report on National Experiences with the Legal Protection of Expressions of Folklore*, document WIPO/GRTKF/IC/3/10, of March 25, 2002, at paragraph 95.

61 See Mark J. Plotkin, *Tales of a Shaman's Apprentice — An Ethnobotanist Searches for New Medicines in the Amazon Rain Forest*, ed. Penguin Books, 1993.

the smoke of the leaves of a magical plant (the 'vine of the soul'[62]). The potion will be served and saved in a vase with symbolic designs and the *pajé* will wear his ceremonial garments for the healing. In certain cultures, the *pajé* is not seen as the healer, but as the instrument that conveys the healing from the gods to the patient."[63]

65. These examples illustrate that TK is an encompassing notion covers several, if not many, areas of human creativity. Thus, to attempt to establish a concept based on a list of covered subject matters may be not very effective, either because areas that have no relation one to another may be included (which may be confusing) or because the list will necessarily be incomplete. On the other hand, the identification of characteristics of TK as subject matter of protection, although more accurate, may be limited to the extent it will reflect national approaches rather than an international one. In a document that seeks a composite view of TK, it may make sense to attempt to provide for a more general and comprehensive definition of TK.

(d) Proposal for a working, comprehensive definition of TK

66. The general process of clarifying terminology in relation to TK can be broken down into several elements:

(a) the choice of an appropriate term, or terms, to describe the subject matter;

(b) the identification or description of the subject matter to be covered by the term or terms selected; and

(c) the determination of the scope of that subject matter which is actually to be granted legal protection.

67. The Committee has generally made use of the term 'traditional knowledge' at two levels: as a general, umbrella term (*lato sensu*) and as a specific term denoting the subject of specific IP protection focussed on the use of knowledge (*stricto sensu*). There is also an established working distinction between TK *stricto sensu*, which refers to knowledge as such as the object of protection, and traditional cultural expressions (and the synonymous term expressions of folklore). This section focusses on element 66(b) above, leaving open the question of what subset of all material defined as traditional knowledge is actually given legal protection (i.e. 66(c)).

68. As a broad characterization, TK *lato sensu* can be understood as 'the *ideas* and *expressions thereof* developed by traditional communities and Indigenous peoples, in a traditional and informal way, as a response to the needs imposed by their physical and cultural environments and that serve as means for their cultural identification.' TK *latu sensu* becomes a convenient umbrella term covering both aspects of protection of TK *stricto sensu*

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62 See Richard Evans Schultes and Robert F. Raffaut, *Vine of the Soul — Medicine Men, Their Plants and Rituals in the Colombian Amazonia,* ed. Synergetic Press and Conservation Int'l, 1992.

63 *Elements of a Sui Generis System for the Protection of Traditional Knowledge,* document WIPO/GRTKF/IC/4/8, of September 30, 2002, at paragraph 38.

and TCEs[64] (in this broader sense, it goes beyond 'knowledge' as such). Some objects of protection touch simultaneously upon those two distinct fields of IP, such as technical creations that have an aesthetic character. For instance, many handicrafts have a utilitarian function, having been developed with a utilitarian purpose and giving effect to a technical idea, but may acquire an additional aesthetic quality. Either because of their use in religious services and other spiritual events, or because of their general association with a culture and a community, handicrafts may become more important as a cultural expression than simply as the product of a technical idea. In this vein, handicrafts may embody TK *stricto sensu* or may be viewed as expressions of TK or TCEs. This lack of a clear distinction about the application of different legal regimes to the same underlying subjet matter is not new in IP law. Indeed, industrial designs may be protected under the law of industrial property,[65] the law of copyright,[66] or both,[67] and each of these options has been applied to TCEs (i.e. for TK protection *lato sensu*).

69. Assuming that a definition "is not aimed at prescribing exactly what portion of knowledge is to be given legal protection … and does not itself define the nature of protection," then a definition of 'traditional knowledge' in the narrower sense (*stricto sensu*) and in the context of IP protection might concern "knowledge which is:

- generated, preserved and transmitted in a traditional context;
- distinctively associated with the traditional or Indigenous culture or community which preserves and transmits it between generations;
- linked to a local or Indigenous community or other group of persons identifying with a traditional culture through a sense of custodianship, guardianship or cultural responsibility, such as a sense of obligation to preserve the knowledge, or a sense that to permit misappropriation or demeaning usage would be harmful or offensive, a relationship that may be expressed formally or informally by customary law;
- knowledge in the sense that it originates from intellectual activity in a wide range of social, cultural, environmental and technological contexts; and
- identified by the community or other group as being traditional knowledge."[68]

70. This definition draws on a number of the themes in the analysis of existing laws noted above, although it does not tie the definition to one particular policy goal or subject area of knowledge (such as biodiversity or medicinal health). This is proposed as a general and more neutral definition of TK that concentrates on knowledge as such (i.e. the content, substance or idea of knowledge, technical know-how and culture), rather than its form of expression (which may be the subject of distinct protection, including copyright and *sui generis* TCE protection): although the scope of protection may effectively extend to the form of expression

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64 For a discussion on the meaning, scope and nature of "traditional culture expressions," see documents WIPO/GRTKF/IC/3/10, paragraphs 88 to 109, and WIPO/GRTKF/IC/4/3, paragraphs 23 to 35. It should be noted that this definition is offered with full understanding that the term "traditional knowledge" constitutes a misnomer, in the sense that it covers more than knowledge in a strict sense.

65 Paris Convention, Articles 1(2) and 5^{quinquies}.

66 Berne Convention, Article 2(1).

67 TRIPS Agreement, Article 25.2.

68 WIPO/GRTKF/IC/5/12, paragraph 45, drawn from document WIPO/GRTKF/IC/3/9, at paragraph 35. At the fourth session of the IGC, the delegation of Switzerland noted that the elements as set out in that paragraph would be a good basis for further work in this area. See *Report*, *supra* note …, at paragraph 135.

of the TK, this maintains the essential distinction between protection of content and protection of the form of expression, a distinction that has deep roots in the structure of intellectual property law.

71. These approaches to definition highlight certain key qualities of TK that distinguish it from general forms of knowledge and from TCEs as objects of protection in their own right.

(a) *the context of creation*: traditional knowledge must clearly be traditional: this refers to the context of its creation, preservation and transmission, so that TK originates in a way that makes it inseparable from the culture and the identity of the community; this can be defined as creation 'in a traditional and informal context,' but may also relate to how the knowledge has been preserved and passed down between generations. This aspect overlaps with the sense of a link to the community.

(b) *association with the community:* TK must be 'distinctively associated with the traditional or Indigenous culture or community which preserves and transmits it between generations:' this indicates that there is a distinctive link to the community which originates the knowledge, and serves as means for their cultural identification. This highlights that TK is often part of the social fabric and everyday life of a community, and is generally not seen as a distinct body of 'knowledge' separate from the community's culture, but rather as integral with the community's culture and its identity as a community. Because its generation, preservation and transmission is based on cultural traditions, TK is essentially culturally-oriented or culturally-rooted, and it is integral to the cultural identity of the social group in which it operates and is preserved.[69] From the point of view of the culture of the community in which it has originated, every component of TK can help define that community's own identity. This characteristic may sound obvious as far as expressions of folklore and handicrafts are concerned, but it also applies to other areas of TK, such as medicinal and agricultural knowledge. A piece of medicinal knowledge developed from a given combination of plants by a South American community, for example, necessarily differs from knowledge developed by an African community, based on similar plants. The reason is that the origination of medicinal knowledge by traditional communities, in spite of its predominantly technical nature, does not only attend to a certain practical need, but also responds to cultural approaches and beliefs. This contrasts sharply with two scientific inventions made separately by two different teams of employed inventors, with the objective of solving the same technical problem: it is not uncommon that the two inventions turn out to be very similar, which, in patent law, may give rise to interference proceedings or similar legal procedures which attribute ownership to one claimant or the other.[70] Competing patent claims to overlapping subject matter are resolved without reference to the cultural environment which gave rise to the inventions; by contrast, the inherent link to the community of TK has important implications for its protection. This raises the importance of a linkage based on a sense of custodianship or responsibility.

(c) *link to the community through a sense of ownership or responsibility:* This aspect of the definition concerns the sense of violation and cultural damage that may arise from the misappropriation and misuse of traditional knowledge, in that misappropriation or demeaning usage would be harmful or offensive, and would run counter to customary obligations to

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69 See document WIPO/GRTKF/IC/4/8, paragraph 28.

70 The "Act on the Protection and Promotion of Traditional Thai Medicinal Knowledge" admits interference procedures in the context of TK registration. See *infra* Part VIII.

preserve and respect the knowledge in a suitably respectful manner. This can include a responsibility to restrict the distribution of or access to the knowledge in line with customary law. Broadly, misuse or unauthorized access may run counter to a sense of custodianship, guardianship, or cultural or spiritual responsibility. The cultural identity dimension and customary law obligations of TK may have a dramatic impact on any future legal framework for its protection, because, being a means of cultural identification, the protection of TK, including TK of a technical nature, ceases to be simply a matter of economics or of exclusive rights over technology as such. It may acquire a human rights dimension, and TK protection may intertwine with the cultural identification and integrity, and the dignity of traditional communities. Analogues could also be drawn with the concept of 'moral rights' in copyright law, specifically the rights of integrity and of attribution, in that it may be considered necessary to protect against culturally offensive use of TK or other non-economic aspects of perceived misuse of TK. Specific remedies, such as additional damages, may also be stipulated in case of culturally offensive misuse of protected material.

(d) *the requirement that it be knowledge:* this is a relatively open requirement, but does limit the definition by excluding form or expression as such, and cultural objects with no knowledge content, and therefore distinguishes TK *stricto sensu* from protection of TCEs and distinctive signs and insignia. The knowledge may also be limited to a conscious "response a response to the needs imposed by [TK holders'] physical and cultural environments." The definition, nonetheless, encompasses all areas, without any limit or discrimination as to the field of technology or culture.

(e) *community to identify traditional knowledge:* This aspect of the definition deals with the sensitive question of who is to identify knowledge as being traditional, given especially that the need for distinct IP protection of traditional knowledge generally only arises when it is removed from its traditional or customary context. While this is dealt with to some extent by the other aspects of this definition, a final test should be that the community itself recognizes or identifies the knowledge as forming part of their living heritage of traditional knowledge. This identification may be informal and implicit, in that it is part of the community's social fabric, or may be explicit, such as knowledge which is the subject of particular obligations, rituals or practices established by customary law. Ultimately, the very notion of TK is based on traditions, and the communities themselves are in the best position to identify them as such. This should be distinguished, however, from the determination of the scope of protection afforded to traditional knowledge, and the question of compliance with distinct IP laws giving protection to TK. This would typically be the role of the judicial or administrative systems of law enforcement specified in the applicable national legislation.

The definition of 'traditional knowledge' can be summarized simply: it must be 'traditional' in that there is an appropriate association with a relevant cultural tradition, and it must be 'knowledge' in that it refers to the content of what is known, rather than its form or expression as such.

V. REVIEW OF NATIONAL APPROACHES TO PROTECTION OF TK

72. This section provides an overview of national approaches that have been taken to the protection of TK, through the three general areas of IP protection identified above (paragraph 22): conventional or general IP rights; adaptations or sui generis elements of conventional IP; and distinct *sui generis* systems. Section VI concentrates on specific *sui generis* systems for TK protection. This material is drawn on the responses to two

questionnaires WIPO/GRTKF/IC/2/5 and WIPO/GRTKF/Q.1, which have been reported in more detail in documents WIPO/GRTKF/IC/5/7, WIPO/GRTKF/IC/4/7, and WIPO/GRTKF/IC/3/7.

73. As pointed out by Singapore in its response to questionnaire WIPO/GRTKF/IC/2/5, intellectual property encompasses two different sorts of means: "inclusionary means", which give "rights to people claiming protection over something that is new, original, etc," or, in other words, that meets the legal conditions for protection; and "exclusionary means, e.g. by preventing people from claiming rights to information that is not new, original, etc." In the language adopted by the Committee, "inclusionary means" are generally referred to as "positive protection", in the sense that it seeks to establish proprietary or other[71] intellectual property rights in claimed subject-matter. In contrast with such protection, some Members have referred to "defensive protection", which does not seek to assert those rights, but merely aims at preventing third parties from claiming rights in misappropriated subject matter.[72] As a matter of course, all IP solutions have an intrinsically exclusionary dimension: IP rights are exercised by saying "no" to third parties. In that sense, the positive side of IP protection for TK, or any other subject matter, has necessarily a "defensive" dimension. That distinction, nonetheless, is very important in the sense that reveals the intention of stakeholders in resorting to IP: in fact, in many instances, TK holders have been more worried with the offensive use of their cultural assets by third parties than with the possibility of putting those at use themselves. On the other hand, communities can use IP rights actively to protect their interests even when they do not seek to commercialize their knowledge or the expressions thereof.[73] Local communities and Indigenous peoples that have the legitimate aspiration of commercializing pieces of their TK, do need to resort to the positive acquisition of rights.

74. Several Committee Members, when reporting to the Committee on their experiences in using traditional IP mechanisms for the protection of TK,[74] highlighted the distinction between positive IP protection of TK and purely (or mostly) defensive protection.

Experiences with positive protection of TK through traditional IP mechanisms.

75. A number of Committee Members, such as Sweden and Switzerland, has indicated that IP mechanisms are, in principle, available for the protection of TK, provided the general conditions under IP law are met. Other Committee Members have identified the conventional IP mechanisms that can be (or have actually been) resorted to in order to protect TK. For example:

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71 Not all elements of intellectual property are the subject matter of property: in some legal systems, the reputation of merchants is a non-proprietary value, yet it is protected by measures for the repression of unfair competition.

72 Such a distinction has been noted in documents WIPO/GRTKF/IC/4/8 (at paragraph 14) and WIPO/GRTKF/IC/4/3 (at paragraph 42(ii)). In discussions at the fourth session of the Committee, several Members acknowledged such a distinction: India (document WIPO/GRTKF/IC/4/15, paragraph 74), Venezuela (*id.*, paragraph 94), Peru (*id.*, paragraphs 96 and 141), Brazil (*id*., paragraph 103) and Norway (*id*., paragraph 133). In previous discussions, the defensive approach was referred to as "negative protection" (see the Report of the second session, document WIPO/GRTKF/IC/2/16, paragraph 122, statement by the delegation of Venezuela).

73 Document WIPO/GRTKF/IC/4/8, paragraph 18.

74 See documents WIPO/GRTKF/IC/2/5 and WIPO/GRTKF/IC/Q.1.

(a) *copyright and related rights*

Australia, Canada, Costa Rica, Indonesia, New Zealand, Qatar, Samoa, Uruguay and the European Community;[75]

(b) *patent law*

Costa Rica, Kazakhstan, Hungary, Japan, Republic of Korea, Republic of Moldova, New Zealand, Romania, the Russian Federation, Uruguay, and Viet Nam;[76]

(c) *plant variety protection*

New Zealand and Turkey;

(d) *trademark law (including collective and certification marks)*

Australia, Canada, France, Hungary, Indonesia, Mexico, Republic of Moldova, New Zealand, Portugal, Uruguay, Viet Nam and the European Community;[77]

(e) *geographical indications*

France, Italy, Hungary, Indonesia, Republic of Korea, Mexico, Republic of Moldova, Portugal, the Russian Federation, Tonga, Turkey, Viet Nam, Venezuela, and European Community;[78]

(f) *industrial designs*

Australia, Costa Rica, Kazakhstan, New Zealand, the Russian Federation, Tonga, and Uruguay;[79] and

(g) *trade secret law (unfair competition)*

Canada, Hungary, Indonesia and the United States of America.

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[75] See actual examples provided by Australia and Canada in Annex I of document WIPO/GRTKF/IC/5/INF/2. The delegation of Hungary, responding to WIPO/GRTKF/IC/2/5, informed that "The Hungarian Copyright Act (Law No. LXXVI of 1999) excludes expressions of folklore from protection under copyright law. Under Article 1, para.(7) of the Act: "The expressions of folklore may not enjoy copyright protection. However, this may not prejudice copyright protection due to the author of a folk-art-inspired work of individual and original nature."

[76] See examples provided by Kazakhstan, Viet Nam and the Russian Federation in Annex I of document WIPO/GRTKF/IC/5/INF/2.

[77] See examples provided by Canada, Mexico and Viet Nam in Annex I of document WIPO/GRTKF/IC/5/INF/2. See examples of collective marks provided by New Zealand and Portugal.

[78] The delegations of France, Italy, Mexico, Portugal, Viet Nam, Venezuela and the Russian Federation have provided actual examples. See Annex I of document WIPO/GRTKF/IC/5/INF/2.

[79] See examples provided by the delegations of Kazakhstan and the Russian Federation.

Experiences with the use of traditional IP mechanisms for the defensive protection of TK.

76. Several Committee Members have put a special emphasis on two traditional IP mechanisms (patents and trademarks), which might (or have actually been) used to prevent others from misappropriating technical creations, signs and symbols that identify traditional communities and Indigenous peoples.

(a) *defensive use of the patent system*

A number of delegations have provided information about defensive measures that could help prevent unwarranted IP claims by unauthorized third parties. (Such measures are discussed in documents WIPO/GRTKF/IC/5/6 and WIPO/GRTKF/IC/5/10.) For example, Colombia and the European Community noted various approaches to disclosing information such as the origin of genetic resources and TK used in the development of claimed inventions, as a possible measure in the prosecution of patent applications. New Zealand and the United States cited instances where the identification of disclosed TK (through the establishment of databases, as the U.S. delegation noted) could help patent examiners become aware of TK which constitutes prior art. The delegation of Japan also mentioned the defensive use of the patent system in the sense that where TK holders resort to "existing IP standards like patent law" they will be able to prevent "any exclusive rights on the traditional knowledge from being obtained by others." [80]

(b) *defensive use of trademark law*

Portugal has indicated that in most cases, resorting to trademark law would not seek to distinguish products (or services) *per se* but rather accord "indirect protection of the subject matter which for the most part seeks to avoid or prevent the registration of marks, or other distinctive signs, that relate to the designation of the traditional knowledge concerned."[81] Canada has provided a practical example of such an approach (the registration of ten petroglyph with a special religious significance by the Snuneymuxw First Nation in order to stop the sale of commercial items, such as T-shirts, jewelry and postcards).[82] New Zealand has informed that a new Trade Marks

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[80] The delegation of Japan refers to the practice (which is relatively common in Japan) of applying for patents for inventions that the applicant does not intend to use, but which he or she does not want to fall in the hands of competitors who may independently reinvent them. A practical solution is to file a patent application, to wait for it to be published (or "laid open for public inspection") and not to request the subsequent examination. Such application thereby falls into public domain and as such it will necessarily be taken into account by patent examiners when assessing the patentability of claims filed by competitors. See Robert J. Girouard, *U.S. Trade Policy and the Japanese Patent System*, Working Paper 89, August 1996, The Berkely Roundtable on the International Economy, available at <www.ciaonet.org/wps/gir01/#txt115> (last visited on January 3, 2003).

[81] See Annex I of document WIPO/GRTKF/IC/5/INF/2.

[82] See Annex I of document WIPO/GRTKF/IC/5/INF/2. That defensive use of trademarks may require an amendment to the legislation of those Committee Members in which the commercial use of trademarks is mandatory. Furthermore, in a few Committee Members, national legislation further requires that only legitimate businesses may file for trademark registration.

[Footnote continued on next page]

Bill, currently being considered by Parliament, will if enacted allow the Commissioner of Trade Marks to refuse to register a trade mark where its use or registration would be likely to offend a significant section of the community, including Maori. This provision would provide additional protection to some expressions of traditional knowledge by preventing the inappropriate registration of marks based on Maori text or imagery.[83] A concrete example of a similar defensive approach was described by Colombia (the "Tairona Culture case").[84]

VI. NATIONAL EXPERIENCES WITH *SUI GENERIS* TK PROTECTION

77. Documents WIPO/GRTKF/IC/5/7 and WIPO/GRTKF/IC/5/INF/2 contain information about four national experiences in using IP *sui generis* for protecting TK: Brazil, Panama, Portugal and Peru. A brief description of those laws follows. The way those four laws define TK was discussed above (section IV(b)). The complete text of these laws is provided in Annex III of document WIPO/GRTKF/IC/5/INF/2.

(a) *Brazilian sui generis law.*

78. The Brazilian *sui generis* regime was established by Provisional Measure No. 2186-16 of August 23, 2001, which regulates the protection of TK in the context (or as a component) of access to genetic resources and associated traditional knowledge. The stated objectives of the statute are to legislate on access to the genetic heritage in the national territory, the continental platform and the exclusive economic area for the purposes of scientific research, technological development or bioprospection; access to traditional knowledge relating to the

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[Footnote continued from previous page]

Such a requirement would also impose an amendment, if the Canadian approach were to be followed.

83 See Annex I of document WIPO/GRTKF/IC/5/INF/2.

84 See Annex I of document WIPO/GRTKF/IC/5/INF/2. At the second session of the Committee, which took place on December 10 to 14, 2001 the delegation of the United States of America informed that, "on August 31, 2001 the USPTO began accepting requests for registration in the Database of Official Insignia of Native American Tribes. The Database would be included, for informational purposes, within the USPTO's database of material that was not registered but was searched to make determinations regarding the registrability of trademarks. To [that] date, the USPTO had received only one request for inclusion in the Database of the official insignia of the Redding Rancheria Wintu Yana Pit River tribe in Redding, California. Notwithstanding this new Database, all trademark applications containing tribal names, recognizable likenesses of Native Americans, symbols perceived as being Native American in origin, and any other application that the USPTO believed suggested an association with Native Americans, were examined by one attorney who had developed expertise and familiarity with this area. Of course, this new Database of Official Insignia did not supersede or otherwise affect the Indian Arts and Crafts Act, of 1935, administered by the Department of the Interior's Bureau of Indian Affairs. In brief, the Indian Arts and Crafts Board promoted the economic welfare of American Indians and Alaska Natives through the development of Indian-produced arts and crafts. It was intended to protect Indian cultural heritage and to assist the efforts of Indian tribes and their members to achieve self-reliance. To achieve these goals, the top priority of the Board was the enforcement and implementation of the Indian Arts and Crafts Act of 1990 which expanded the powers of the Board to respond to growing sales of arts and crafts products misrepresented as being made by Indians. The Act also provided for severe civil and criminal remedies." See document WIPO/GRTKF/IC/2/16, paragraph 27.

genetic heritage, relevant to the preservation of biological diversity, the integrity of the country's genetic heritage and the use of its components; the fair and equitable sharing of the benefits derived from the exploration of the genetic heritage and related traditional knowledge; access to technology and the transfer of technology for the preservation and use of biological diversity. Human genetic material is excluded from the scope of the law (Article 3).

79. Brazil's Provisional Measure No. 2186 –16 provides protection for the traditional knowledge of indigenous and local communities, relating to the genetic heritage, against the use and unlawful exploration, and other acts that are prejudicial or unauthorized by the Management Council referred to in Article 10, or by an approved institution. (Article 8). Article 9 provides that

> "The indigenous and local communities which generate, develop, hold or preserve the traditional knowledge relating to the genetic heritage are guaranteed the right to:
>
> I – have the origin of the access to traditional knowledge stated in all publications, uses, explorations and disclosures;
>
> II – prevent unauthorized third parties from:
>
> (a) using, or carrying out tests, research or exploration relating to, the relevant traditional knowledge;
>
> (b) disclose, transmit or retransmit data or information contained in or constituting relevant traditional knowledge;
>
> III – obtain benefits through economic exploration by third parties, either directly or indirectly, of the relevant traditional knowledge, whose rights are under their ownership, in accordance with the Provisional Measure."

TK holders are also entitled to assign their rights and conclude licensing contracts. The statute has no provisions on compulsory licenses.

80. Chapter VII of the Brazilian statute — on benefit sharing — deals with remuneration. In general, this must be fair and equitable, and may consit of the following modalities: a share of the profits; the payment of royalties; access to and transfer of technologies; licensing, free of charges, products and processes; and human resources training.

81. Protection does not require any formal procedure or registration, upon the fulfillment of the statutory criteria. The grant and validity of industrial property rights in processes or products obtained from genetic resources depend on the provision of information on the origin of the genetic material and related traditional knowledge, where necessary (Article 31). TK holders are also entitled to a fair and equitable share in benefits obtained from the commercialization of products and processes obtained from genetic resources (Article 24).

82. The Brazilian statute provides for the following exceptions to rights in TK conferred:

"Article 43 - The provision contained in the previous article does not apply to:

I – acts carried out by unauthorized third parties, for private purposes and with no commercial aim, without harming the economic interest of the patent owner;
II – acts carried out by unauthorized third parties as experiments, relating to studies or scientific or technological research;
III – the preparation of medicines based on a medical prescription for individual cases, drawn up by a skilled professional, as well as for the medicine thus prepared;
IV - a product manufactured according to a process or product patent which has been placed on the domestic market directly by the patent owner or with his consent;
V - third parties which, in the case of patents relating to living organisms, use, for non-economic purposes, the patented product as an initial source of variation or propagation in order to obtain other products; and
VI - third parties which, in the case of patents relating to living organisms, use, circulate or market a patented product which has been lawfully traded by the patent owner or by a license holder, since the patented product has not been used for commercial propagation of the living organism in question."

83. On enforcement measures, the Brazilian statute provides for civil, administrative and criminal sanctions, such as: security; fine; seizure of the genetic heritage samples and of the instruments used in the collection or processing of the products obtained from the information relating to the relevant traditional knowledge; seizure of the products derived from the sample of the genetic heritage or related traditional knowledge; suspension of the sale of the product derived from the sample of the genetic heritage or related traditional knowledge and its seizure; embargo on the activity; partial or total prohibition of the establishment, activity or undertaking; suspension of the registration, patent, license or authorization; cancellation of the registration, patent, license or authorization; loss or restriction of the share in the funding line in an official credit institution; operation in the institution; prohibition on contracts with the Public Administration for a period of up to five years.

84. Under Article 8(4) of the Brazilian law, protection of TK shall not affect, prejudice or limit the rights relating to intellectual property.

(b) *Panama's sui generis regime*

85. In 2000 Panama adopted Law No. 20 of June 26, 2000, regulated by Executive Decree No. 12 of March 20, 2001, entitled "Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples, for the Protection and Defense of their Cultural Identity and their Traditional Knowledge, and Other Provisions." The objectives of Law No. 20 are the protection and defense of the collective intellectual property rights and the traditional knowledge of indigenous peoples in relation to their creations, such as inventions, models, drawings and designs, innovations contained in images, figures, symbols, graphics, petroglyphs and other material, in addition to the cultural elements of their history, music, art and traditional artistic expressions that are suitable for commercial use, afforded by means of a special system of registration, promotion and commercialization of their rights, with a view to enhancing the socio-cultural values of indigenous culture and doing social justice to those peoples. The cultural heritage of indigenous peoples may not be the subject of any form of exclusive rights in favor of third parties not authorized under the intellectual property system,

such as copyright, industrial design and trademark rights, and the rights in geographical indications and other subject matter, except where the application is made by the indigenous peoples themselves.

86. Law No. 20 defines collective indigenous rights as indigenous cultural and intellectual property rights that relate to art, music, literature, biological, medical and ecological knowledge and other subject matter and manifestations that have no known author or owner or date of origin, being the heritage of an entire indigenous people.[85] The rights granted are of an exclusive nature but they may be recognized to the benefit of third parties provided the request is filed by the indigenous peoples themselves.

87. Protection is granted upon registration. The administrative procedures are payment-free and do not require the representation of a lawyer. The Traditional Indigenous Congress(es) or Authority (Authorities) of the indigenous peoples are entrusted with representing them and complying with the requirements laid down in the Regulations under the Law. The intellectual property agency of Panama (DIGERPI) will create a position of examiner on indigenous collective rights, for the protection of the intellectual property and other traditional rights of the indigenous communities. This public officer will have the power to examine all the applications that are filed before DIGERPI related with the collective rights of the indigenous communities, so the registration will not be granted against this law. The Regulations provide that there can be traditional knowledge of indigenous peoples in the form of creations shared between members of two or more communities, in which case the benefits accrue to both or all of them collectively, according to customary law.

88. Law No. 20 provides for a prior user exception to rights conferred: Article 23 says that "The small non-indigenous artisans that dedicates to the manufacture, productions and sale of the reproduction of crafts belonging to indigenous Ngobes and Buglés that reside in the districts of Tolé, Remedios, San Félix and San Lorenzo of the Province of Chiriqui are exempt of this law. These small non-indigenous artisans will be able to manufacture and to market these reproductions, but they will not be able to claim the collective rights recognized by this Law to the indigenous group."

89. Law No. 20 provides for administrative, civil and criminal sanctions against infringement of TK. Custom and industrial property laws are the primary sources of enforcement measures. In cases not provided for in either customs legislation or industrial property legislation, violations of Law No. 20 are punished with fines ranging from 1,000 to 5,000 U.S. dollars, depending on their seriousness. In the event of a repeat offense, the amount of the fine is doubled. The sanctions provided for in the Law are applied in addition to the seizure and destruction of the materials used to commit the infringement.

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85 The delegation of Panama noted that work is currently undergoing on a draft law for the protection of the collective rights of local communities, which broadens the definition as follows: they are the intellectual property rights of indigenous peoples and local communities the subject matter of which is art, music, literature, biological, medical and ecological knowledge, rituals, games, cultural expressions, traditional science and technology, gastronomy, cultural traditions, beliefs and other aspects of the cultural heritage that are not dissociable from the cultural identity of a whole community.

90. Under the Law and its Regulations, the owners of rights may assign and license the use of registered collective rights. There is no provision for the grant of compulsory licenses.

91. Some aspects of industrial property are complementary to TK protection. Law No. 20 establishes that the provisions on collective and certification marks contained in Law No. 35 of 1996 shall be applicable in so far as they do not conflict with the rights provided for in Law No. 20 itself. The application for registration should (1) include rules of use, which, in addition to the identifying particulars of the applicant authorities, should specify the grounds on which use of the collective rights may be denied to a member of the indigenous people, and (2) include a favorable report by the competent administrative body on the rules of use.[86]

(c) *Peru's sui generis regime*

92. The *sui generis* regime of Peru was established by Law No. 27,811 of 2002, whose objectives are the following: (a) to promote respect for and the protection, preservation, wider application and development of the collective knowledge of indigenous peoples; (b) to promote the fair and equitable distribution of the benefits derived from the use of that collective knowledge; (c) to promote the use of the knowledge for the benefit of the indigenous peoples and mankind in general; (d) to ensure that the use of the knowledge takes place with the prior informed consent of the indigenous peoples; (e) to promote the strengthening and development of the potential of the indigenous peoples and of the machinery traditionally used by them to share and distribute collectively generated benefits under the terms of this regime; and (f) to avoid situations where patents are granted for inventions made or developed on the basis of collective knowledge of the indigenous peoples of Peru without any account being taken of that knowledge as prior art in the examination of the novelty and inventiveness of the said inventions.

93. Protection is afforded to collective knowledge of Indigenous peoples associated to biological resources, as defined in Article 2 of the Law.[87] Under Article 10, TK may not be individually owned. Indigenous peoples will exercise and enforce their rights through their representative organizations.

94. Law No. 27,811 grants Indigenous peoples the right to accord consent (provided it is prior to the use and informed) for the use of TK. In the event of access for the purposes of commercial or industrial application, a license agreement shall be signed in which terms are provided that ensure due reward for the said access and in which the equitable distribution of the benefits deriving therefrom is guaranteed. Contracts must be written and they shall be

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86 The delegation of Panama has informally communicated to the WIPO secretariat that the first act of registration of handicrafts (the *molas* of the Kunas) is near completion, upon approval of its Regulation of Use.

87 The term "Indigenous peoples" means aboriginal peoples holding rights that existed prior to the formation of the Peruvian State, maintaining a culture of their own, occupying a specific territorial area and recognizing themselves as such. These include peoples in voluntary isolation or with which contact has not been made, and also rural and native communities. "Collective knowledge" means the accumulated, transgenerational knowledge evolved by indigenous peoples and communities concerning the properties, uses and characteristics of biological diversity. And the term "Biological resources" means genetic resources, organisms or parts thereof, populations or any other kinds of biotic component of ecosystems that are of real or potential value or use to mankind.

registered with the intellectual property agency (INDECOPI). The Law establishes two minimum royalty rates (which are apparently cumulative): a percentage which shall not be less than ten per cent of the value, before tax, of the gross sales resulting from the marketing of goods developed on the basis of collective knowledge shall be set aside for the Fund of the Development of Indigenous Peoples provided for in Articles 37 *et seq.*. The parties may agree on a greater percentage according to the degree of direct use or incorporation of the said knowledge in the resulting end product and the degree to which the said knowledge contributed to the reduction of the cost of research and development work on derived products, among other things. (Article 8). Additionally, the licensing agreement shall contain a statement of the compensation that the indigenous peoples receive for the use of their collective knowledge; such compensation shall include an initial monetary or other equivalent payment for its sustainable development, and a percentage of not less than five per cent of the value, before tax, of the gross sales resulting from the marketing of the goods developed directly and indirectly on the basis of the said collective knowledge, as the case may be. (Article 27(c)).

95. Law No. 27,811 distinguishes three categories of TK according to its level of novelty. Under Article 13, collective knowledge that has been made accessible to persons other than the indigenous peoples by mass communication media such as publication or, when the properties, uses or characteristics of a biological resource are concerned, where it has become extensively known outside the confines of the indigenous peoples and communities, is deemed in public domain. However, in the event the collective knowledge has passed into the public domain within the previous 20 years, a percentage of the value, before tax, of the gross sales resulting from the marketing of the goods developed on the basis of that knowledge shall be set aside for the Fund for the Development of Indigenous Peoples provided for in Articles 37 *et seq.* In other words, TK that has been disclosed within the previous twenty years is subject to a sort of paid public domain regime. TK holders will have not the right to oppose to its use by third parties, they are entiitled to a mere right of remuneration. Both categories of TK in the public domain will be contained in the Public Register of Collective Knowledge of Indigenous Peoples. The third category is TK which has not been publicly disclosed and therefore has not fallen into the publkic domain. Undisclosed TK will be registered in the Confidential National Register of Collective Knowledge of Indigenous Peoples as per Indigenous peoples' request. Both Registries will be managed by INDECOPI.

96. The rights conferred are those of registering (Article 20)[88] and licensing (Article 27) TK. Moreover, Indigenous peoples possessing collective knowledge shall be protected against the disclosure, acquisition or use of that collective knowledge without their consent and in an improper manner provided that the collective knowledge is not in the public domain. Registered TK shall likewise be protected against unauthorized disclosure where a third party has legitimately had access to collective knowledge covered by a safeguard clause. (Article 42). Indigenous peoples possessing collective knowledge may bring to the Office of Inventions and New Technology, of INDECOPI, infringement actions against persons who violate their rights in TK. An infringement action shall also be permissible where there is an immediate danger of such violation. Infringement actions may be brought *ex officio* by order of INDECOPI. (Article 43). Where infringement of the rights of an indigenous people possessing specific collective knowledge is alleged, the burden of proof shall be on the

[88] However, registration of TK is declaratory, and not constitutive of rights. This means that rights precede or are independent of registration. The importance of registration is in the establishment of elements of evidence of the rights' existence.

defendant. (Article 44). TK holders may bring the actions claiming ownership and compensation that are available to them under the laws in force against a third party who, in a manner contrary to the provisions of this regime, has directly or indirectly made use of the said collective knowledge. (Article 45). Provisional measures are available.

97. Registration can be cancelled at any time, either INDECOPI may, either *ex officio* or at the request of a third partyparty, after the parties concerned have been heard, where: (a) the registration or license has been granted in violation of any of the statutory provisions; or (b) it is shown that the essential data contained in the application are false or inaccurate. (Article 34).

98. As noted above, protection of TK in Peru has both a positive and a defensive purpose. On the defensive side, the Law establishes that, with a view to opposing pending patent applications, challenging granted patents or otherwise intervening in the grant of patents for goods or processes produced or developed on the basis of collective knowledge, INDECOPI shall send the information entered in the Public National Register to the main patent offices of the world in order that it may be treated as prior art in the examination of the novelty and inventiveness of patent applications. (Article 23). Furthermore, the second complementary provision says that "Where a patent is applied for in respect of goods or processes produced or developed on the basis of collective knowledge, the applicant shall be obliged to submit a copy of the license contract as a prior requirement for the grant of the rights concerned, except where the collective knowledge concerned is in the public domain. Failure to comply with this obligation shall be a cause of refusal or invalidation, as the case may be, of the patent concerned."

(d) *Portugal's sui generis law*

99. The objective of Portugal's Decree-Law No. 118, of April 20, 2002 is to establish "the legal regime of registration, conservation, legal custody and transfer of plant endogenous material with an actual or potential value for agriculture, agro-forestry and landscape-related activities, including local varieties and spontaneous material as defined in Article 2,[89] as well as knowledge associated thereto […]." (Article 1). In Article 3 traditional knowledge is defined as "all the intangible elements associated to the commercial or industrial use of local varieties[90] and other endogenous material developed by local communities, collectively or individually, in a non-systematic manner and that are inserted in the cultural and spiritual traditions of those communities, including, but not limited to, knowledge relating to methods, processes, products and denominations that are applicable in agriculture, food and industrial activities in general, including handicrafts, trade and services, informally associated to the use and preservation of local varieties and other endogenous and spontaneous material that is covered by the present law." Protection is provided against the "commercial or industrial reproduction and/or use" of traditional knowledge, "provided the following conditions of protection are met: a) traditional knowledge shall be identified, described and registered in the Registry of Plant Genetic Resources (RPGR); b) the description referred to in the previous

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89 Article 2.1 identifies the varieties covered by the Decree-Law and excludes those "that are protected by intellectual property rights or relating to which there is an ongoing process aiming at providing for such protection". The purpose of this provision is, obviously, to avoid overlapping with UPOV as well as the patent system.

90 The term "local varieties" means landraces. The Portugue Decree-Law is indeed the first law ever that establishes a system for the protection of landraces.

subparagraph shall be made in a manner that allows for other persons to reproduce or use the traditional knowledge and obtain results that are identical to those obtained by the knowledge holder." (Article 3.2). Article 3.3 provides that "traditional knowledge holders may opt for keeping it in confidentiality, in which event the regulation will set forth the modality of its publication in the gazette of registration […], which shall be limited to give notice of the existence of the knowledge and to identify the varieties to which they are associated, the protection conferred by the certificate being limited to the event they have been acquired by third parties in an unfair manner." The Portuguese Decree-Law identifies two additional (and alternative) conditions for protection: traditional knowledge must not have become publicly known beyond the local community in which it has been developed; but, if it has, it may nonetheless be protected, provided it has not been industrially (or commercially) utilized. (Article 4). Knowledge that meets those conditions shall confer "the right: *i*) To prevent unauthorized third parties from reproducing, imitating and or using, directly or indirectly, for commercial purposes; *ii*) To assign, transfer or license the rights in traditional knowledge, including transfer by succession; *iii*) Traditional knowledge that is the subject matter of specific industrial property registrations is excluded from protection."[91] Protection is conferred upon registration (Article 3.5) by local communities.[92] The registration of traditional knowledge shall provide effects for a period of 50 years from the date of the application, renewable for an identical period. (Article 3.6). Civil, criminal and administrative remedies are available.

VII. ELEMENTS OF *SUI GENERIS* SYSTEMS FOR TK PROTECTION

100. This discussion discusses the possible elements of *sui generis* systems for protection of TK, which are primarily aimed at:

- providing positive protection of TK as distinct from defensive protection;
- providing protection to TK in the intellectual property sense, through the creation of specific rights in intangible properties;
- protecting the content of TK as such (as distinct from protection of expressions of traditional culture or of distinctive signs related to TK); and
- protecting through distinct *sui generis* rights related to TK, rather than protecting through specific *sui generis* elements of conventional or general IP systems.

(a) *Background issues*

101. Intellectual property is a set of principles and rules that discipline the acquisition, use and loss of rights and interests in intangible assets susceptible of being used in commerce. Its subject matter is inherently dynamic, and so are the principles and rules that it comprises. Consequently, IP has evolved recently at a very fast pace so as to accommodate the new technologies and methods of doing business generated by the global economy. In some areas, existing legal mechanisms have been adapted to the characteristics of new subject matter: the

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91 The *sui generis* system established by Decree-Law 118, therefore, does not overlap either with UPOV or the patent system.

92 Article 9 sets forth a system of acknowledgement of local communities by the municipal authorities. The notion of local communities is linked to the geographical boundaries of the zones in which the local varieties exist or the endogenous spontaneous material presents "the highest genetic variability".

patent system has been confronted with the challenges of biotechnological inventions and new processes of using information technology (so called "business methods"); copyright and related rights have been broadened so as to meet the challenges of computer software, electronic commerce and protection of databases. But in other areas, new systems have been created, where it appeared that a mere effort of adapting existing mechanisms would not respond adequately to the characteristics of new subject matter. Plant varieties have justified the establishment of a *sui generis* system, whose leading regime is defined by the UPOV Convention;[93] layout-designs (topographies) of integrated circuits have also been the subject matter of a special system that combines features of patent, industrial designs and copyright laws. What makes an IP system a *sui generis* one is the modification of some of its features so as to properly accommodate the special characteristics of its subject matter, and the specific policy needs which led to the establishment of a distinct system. As the WTO Secretariat put it in connection with the explanation of the *sui generis* system of plant variety protection, under Article 27.3(b) of the TRIPS Agreement, "*Sui generis* protection gives Members more flexibility to adapt to particular circumstances arising from the technical characteristics of inventions in the field of plant varieties, such as novelty and disclosure."[94]

102. In this vein, any reference to a *sui generis* system for the protection of TK does not mean that a legal mechanism must be entirely construed from scratch. On the contrary, IP has evolved to remain an efficient mechanism to promote technological progress, transfer and dissemination of technology and to serve the rights and interests of creators, as well as of fairness in commerce. The main thrust of IP is that it covers intangible assets and that it provides its holders the right to exclude others from reproducing works and/or fixing performances and reproducing those performances (i.e. copyright and related rights) as well as the right to exclude others from using the protected subject matter (i.e. industrial property rights). The idea to be retained is that IP is the right to say "no" to third parties (and, consequently, the right to say "yes" to a person who requests permission to reproduce and/or fix and/or use the protected subject matter). Intellectual property does not necessarily cover "intellectual works" as such — it covers intangible assets of diverse origins, which need not entail abstract intellectual work; nor need it be defined and protected through property rights alone (the moral rights of authors and the reputation of merchants are not the subject of property, under a civil law concept).

103. If they develop in appropriate ways, IP systems may therefore have an essential role in the preservation of the cultural identity of traditional communities and, consequently, in the empowerment of TK holders, in the sense that they will be attributed the crucial right of saying "no" to third parties that engage in the unauthorized and/or distorting use of their TK, regardless of its commercial nature. In other words, even those communities that believe their knowledge (or portions of it) should remain outside the commercial channels, may benefit from IP protection, as it will give them the power to prevent their knowledge from being commercialized and/or used in a distorting or culturally insensitive manner.

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93 See the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991. UPOV stands for the French acronym *Union pour la Protection des Obtentions Végétales* (International Union for the Protection of New Varieties of Plants).

94 *The Convention on Biological Diversity and the Agreement on Trade-Related Aspects of Intellectual Property Rights, Note by the Secretariat*, WTO document IP/C/W/216, of October 3, 2000, paragraph 33. The TRIPS Agreement constitutes Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (the WTO).

The holistic approach and the role of customary law

104. The present document is not intended to preempt the debate on the need for establishing a *sui generis* system for the protection of TK either as a substitute or as a complement for the existing mechanisms of intellectual property. It merely aims, in line with the requests of several Committee Members, to identify some elements that should be taken into account if, and only if, a decision is made to develop such a system. Any *sui generis* system needs to be distinguished from existing IP systems, and its interaction with conventional IP may need to be explored. Most importantly, it is necessary to clarify whether an IP system (*sui generis* or otherwise) is desired at all, or whether another form of protection (such as one giving legal effect to customary law is intended). It is clear that some aspects of TK can be adequately protected by existing IP mechanisms; however, even if IP protection can be applied to certain aspects of TK, this does not mean that all necessary aspects of the TK have been protected, or that the TK has been protected in a way that corresponds to demands for a comprehensive or holistic form of protection. For example, when the fable of the shaman[95] was earlier discussed by the Committee, a delegation noted that 'impractical simplifications should not lead to the conclusion that existing IP rights could provide sufficient protection for TK.'[96] Analysis of the various aspects of TK that can already be protected should help illustrate both the complexity of the protection of TK, and also shed light on the context for the development and application of any additional, *sui generis* forms of protection.

105. Actual experience with *sui generis* protection systems at the national level (see section VI above) suggest that some choices need to be made that distinguish the specific definition and legal protection afforded from the full social, environmental and spiritual context of the TK – precisely because *sui generis* protection has been developed not to codify existing customary law that applies within the traditional community, but rather to extend the reach of legal protection beyond the traditional context. To many participants in the debate about protection of TK, the application of existing IP laws to TK subject matter, or even the search for *sui generis* IP solutions is unsatisfactory, because it is felt that the authority for protection and the form of protection should be based on the customary law of the traditional community itself. For instance, it has been suggested that the 'principle of locality' should be applied to protection of indigenous cultural and IP rights: 'the solution is to resolve any disputes over the acquisition and use of indigenous people's heritage according to the customary laws of the indigenous peoples concerned,'[97] or the application of the principle of *lex loci* Such an approach would not entail codifying or specifying anew forms of legal protection, but rather giving effect more broadly to rules or norms that apply within the context of the traditional heritage that has generated and sustained TK.

106. If, however, the choice is taken to apply distinct IP forms of protection to TK subject matter, apart from customary law, it should be recognized that firstly that the operation of legal protection should be distinguished from the complex, holistic quality of traditional knowledge itself; and secondly that in practice no single IP system, however broad in scope, is likely to embrace all the characteristics and the full context of traditional knowledge in its

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95 Paragraph 64, *supra*, and document WIPO/GRTKF/IC/4/8, paragraphs 38-39.

96 See document WIPO/GRTKF/IC/415, paragraph 140.

97 Dr. E.A.Daes, 'Defending Indigenous Peoples' Heritage,' *Protecting Knowledge: Traditional Resource Rights in the New Millennium,* Union of British Columbian Indian Chiefs, February 2000.

original cultural setting. Hence, the shaman's practice of traditional knowledge, the spiritual beliefs to which it gives effect and the collective cultural heritage from which it is derived and which it enriches in turn, are not fully recognized when specific elements of the TK are protected by existing IP systems, such as when:

- "the different plants from which the shaman has made the potion may be protected under a plant variety protection system, provide the plants are new, stable, distinct and uniform;

- the potion (or the formula thereof) can be the subject matter of a patent, provided it is new, inventive and susceptible of industrial application, or as undisclosed information;

- the use and the dosage of the potion can also be protected by a patent, under the laws of a few Committee Members which make patents available for new uses of substances as well as for new and inventive therapeutic methods;

- the prayer, once fixed, could enjoy copyright protection, and under many countries' laws may also enjoy copyright protection in the absence of fixation;[98]

- the performance, once fixed, can be protected by copyright-related rights, and the shaman - as performer - can be accorded the right to authorise the fixation of the performance;[99]

- the vase containing the potion can be patented or protected under a utility model certificate if it has new and inventive functional features; if not, it can be protected under an industrial design system;

- the designs on the vase and on the garments can be protected either by the copyright or by the industrial design systems."

As a matter of course, the availability of the existing mechanisms for the protection of those separate elements of TK would depend on their meeting the legal requirements for protection. These mechanisms may be available as a practical tool, to be drawn on as required to defend the interests of the shaman and his community and cultural heritage; and this need not entail replacing the traditional knowledge system with these specific tools, nor subordinating the traditional context to the IP system.

107. The possibility of protecting separately some aspects of TK does not fully cover the identified need for protection of TK. Traditional knowledge is not the mere sum of its separated components: it is the consistent and coherent combination of those elements into an indivisible piece of knowledge and culture. For the *pajé*, needless to say, the merit of the healing resides in the combination of the extract with the religious rituals, and not on the potion individually. The features of the several IP mechanisms mentioned above do not accept such a combination of elements of knowledge as a subject matter. It may be necessary, therefore, to design a system that responds to the holistic nature of TK and takes a

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98 The Berne Convention, Article 15(4)(a), also provides for the protection of unpublished works of unknown authorship.

99 Under the provisions of the WIPO Performances and Phonograms Treaty, Article 6(2)

comprehensive approach to it. Patents, trademarks, designs, etc, may be very effective in providing protection for the individual elements of TK; but they do not attend to its holistic nature.

108. Traditional knowledge, in that holistic concept, has four unique characteristics: the spiritual and practical elements of TK are intertwined and thus are inseparable (it is in this sense that every element of TK serves as an inherent factor of cultural identification of its holders); since traditional communities generate knowledge as a response to a changing environment, TK is in constant evolution and incrementally improving; TK covers different fields, in areas of cultural expressions and in technical domains; finally, because its creation is not necessarily undertaken through a formal, expressly systematic procedure, TK may appear informal in character, and its full character and systematic nature may only be apparent with a greater understanding of the cultural contexts and rules that govern its creation.

109. The need for a new legal approach that adequately reflects the holistic nature of TK, however, is not incompatible with measures enforcing rights in specific elements of TK. It does not diminish the holistic quality of TK, nor its integral link to the life of a traditional community, for IP rights to be exercised to restrain certain third parties from misusing aspects of TK. This highlights the distinction between the TK as such, and specific measures taken to protect it (see paragraph 32 above and the following paragraph below). If a third party uses the formulation of the potion invented by the shaman, enforcement measures should be available to address such an act of infringement regardless of the lack of the reproduction of the prayer or the performance by the infringer. Even within the existing IP rights system, infringement may occur without every aspect of the protected subject matter being taken, and misuse of only some specific aspects will be sufficient to amount to infringement. In patent law, an infringer does not need to "trespass" on all the claims of a patent to be liable as such. Infringement of one way of claiming the protected inventive concept may be enough, as a matter of law. Similarly, it is possible to infringe copyright in a musical work by different acts (reproduction, broadcasting, making available to the public, etc.) without necessarily carrying out them all, or a sufficient portion of a work without reproducing it entirely. The holistic quality of TK may call for a comprehensive mechanism for its recording and registering, but should not stand in the way of the enforcement of rights in each of its individual elements. A person's intellectual output may be conceived in holistic terms, but may be defended against misappropriation or misuse by distinct use of patents over the inventive ideas and copyright over the journal articles or books in which the work is set out.

110. It is crucial in this context to note that 'traditional knowledge' conceived in its full social and cultural context is not the same as the legal means used to protect it. As the Crucible Group has observed, "Once you have done to indigenous and local knowledge whatever is necessary to make it fit into the IP mould, it would not be recognizable as indigenous and local knowledge anymore."[100] The essential characteristics of TK should be preserved, while recognizing that different aspects of the TK may and should be protected as necessary by an array of legal and other tools: among these may be *sui generis* protection, to the extent that national policymakers and community representatives determine that there is a clear need and practical demand for such a system.

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[100] Crucible Group II, 'Seeding Solutions,' 2001

(b) *General legal framework of a sui generis system: clarifying the role of databases*

111. Those distinctive characteristics of TK must be somehow reflected in the general framework of any *sui generis* system to be considered at the international level, should a consensus on the development of such a system be reached. Given its holistic nature and the need to respect its cultural context, the *sui generis* system should not require the separation and isolation of the different elements of TK, but rather take a systematic and comprehensive approach. Suggestions have already been tabled to reflect (and respect) the holistic nature of TK in a way that permits its description and fixation into general inventories of knowledge belonging to a certain community (or group of communities). The inventory, or compilation, or database would describe in detail the knowledge of traditional communities, without separating its components.

112. In international discussions on a *sui generis* database regime for the protection of TK the word "database" has been misunderstood as necessarily suggesting sophisticated electronic tools for electronically collecting and retrieving pieces of TK, and for delivering TK into the public domain, potentially without the prior informed consent of the TK holders. That is perhaps due to the particular forms of databases which can be used for "defensive protection" of TK and in particular to ensure that patent examiners take account of TK when searching prior art.[101] In this context, the emphasis naturally lies on enhanced access to the TK, rather than the legal protection of it. In fact, there are serious concerns that collection of TK in such a database, where there is no clarification or confirmation of rights attached to the TK, may undermine claims to rights in the TK as such. This is discussed more fully in document WIPO/GRTKF/IC/4/5 ("Draft Outline of an Intellectual Property Management Toolkit for Documentation of Traditional Knowledge"). This form of database would normally only be advisable for TK which is unquestionably already in the public domain, or those elements of their TK which TK holders concerned clearly wished to have placed in the public domain, fully conscious of the implications of doing so (this may not include, for instance, those elements of their TK that are considered sacred, valuable, secret, technologically or commercially significant, or otherwise inappropriate for entry into the public domain). Document WIPO/GRTKF/IC/5/3 discusses the parallel situation for expressions of traditional cultures or of folklore, in cases where archives, libraries and similar repositories may have the effect of making available for public access expressions of traditional cultures, in situations where the performers or custodians of the traditional cultures may not have had an opportunity effectively to exercise rights to the archived or collected materials.

113. For the purposes of positive protection of TK, a different conception of "database" may apply, where the database is used in the context of defining and asserting specific rights to the covered material, where enforceable rights can be secured. Such a database may be more of the character of an "inventory," "collection" or "compilation", and implies that different pieces of TK may be collected in a single repository without the obligation of maintaining a unity of creation. A common denominator, of course, will run through all pieces of TK included in the same inventory and claimed by one single community: that will be the cultural identification of the claiming community. But TK of a different nature may coexist in the same inventory and still be the subject of a coherent legal approach. The holistic composition of databases permits, therefore, that the different elements of the *pajé*'s

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[101] See, *e.g.*, *Inventory of Existing Online Databases Containing Traditional Knowledge Documentation Data*, WIPO/GRTKF/IC/3/6, of May 10, 2002.

knowledge be collected in a single title. To that extent, the words "database", "inventory", "registry" or "compilation" simply illustrate that the formal protection of TK, where adopted, need not require unity of creation — as opposed to the unity of invention, under patent law.

114. A system based on an inventory of knowledge would also have the advantage of permitting the updating and modification of its contents, as well as the adding of new contents, without the need for complex and costly formalities, such as a new registration procedure. The fact that the TK would be described in its entirety would attend to the complementary nature of its (inseparable) elements. The knowledge of that shaman could therefore be fixed into a database and protected under different (and likewise complementary) sets of rights: the rights to prevent the *reproduction and/or fixation* of the literary and artistic elements of his knowledge; and the rights to prevent the *use* of the technical elements of the database contents.[102]

115. Because of the intrinsically practical nature of TK, its description and fixation into an inventory would necessarily be extremely flexible, in the sense that the only requirement — particularly as far as technical elements are concerned — would be that the description should be comprehensible by a person skilled in that particular field of the art. No one should expect, for example, that the shaman provided the formula or the composition of the formula or molecule of a particular chemical component, but simply a description of the materials he uses, in a manner that another person could reproduce it. The importance of a fairly complete and reasonable description underscores the general principle that the scope of the rights that can be enforced is directly linked to the nature of the information that forms the basis of the right – the concept of sufficiency of disclosure, or fair basis, in patent law. In this sense, a reasonably clear description of protected TK would facilitate the enforcement of TK holders' rights against trespassers. In other words, a better comprehension of the "borderlines" of TK would help clarify whether alleged infringers have in fact "trespassed" across those lines.[103]

116. Finally, it should be noted that the holistic nature of TK is not a legal concept in itself, but rather results from the complementary nature of certain elements of that knowledge, some of which are mainly of a cultural and spiritual sort, while others are essentially practical, as the *pajé*'s fable illustrates. But some communities have been able to separate their knowledge into different forms of cultural and economic uses, namely in the fields of expressions of folklore and handicrafts. That may lead to a recommendation to pursue different (and complementary) legal tracks that better fit the characteristics of those pieces of knowledge no longer intrinsically associated to the whole system of culture of communities but which fit better within compartments of that system. The "holism" of TK, therefore, should not be carved in stone and a flexible approach should be preferred. A protection system may only be aimed at serving specific policy needs, rather than protection of all aspects of the TK. In this

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[102] See *infra* Section V(c)(v).

[103] Article 3 of the Portuguese Decree-Law No. 118/2002 reads:
"[…]
2 – Such knowledge shall be protected against its commercial or industrial reproduction and/or use, provided the following conditions of protection are met:
a) Traditional knowledge shall be identified, described and registered in the Registry of Plant Genetic Resources (RPGR);
b) The description referred to in the previous subparagraph shall be made in a manner that allows for other persons to reproduce or use the traditional knowledge and obtain results that are identical to those obtained by the knowledge holder."

vein, the elements that are identified below, and which are based on a possible mechanism for the protection of inventories or compilations of TK, should not be seen as exclusive. For example, TCEs (expressions of folklore) that have been dissociated from the physical environment where communities dwell and that, therefore, have acquired an independent standing in the cultural universe of certain communities, may be protected through the kind of legal protection discussed in document WIPO/GRTKF/IC/5/3. Protection of handicrafts may also be addressed under a registration system that recognizes its unique *style* that unequivocally materializes the soul and spirit of certain traditional communities, which may be linked to the suppression of unfair competition as the underlying legal doctrine. It is possible, then, that the work on the protection of TK leads to the designing of a "menu" of *sui generis* mechanisms that represent the different aspects of TK and that, like the existing mechanisms, can be used complementarily by TK creators and holders as they see fit.

(c) *Elements of a sui generis system*

117. One issue is to identify the general features of an adequate *sui generis* system for the protection of TK, and another to identify the elements that system must contain in order to be effective. In order to identify those elements, one has to provide responses to several essential questions to which any effective legal system for the protection of property rights must be able to respond satisfactorily:

(i) what is the policy objective of the protection?

(ii) what is the subject matter?

(iii) what criteria should this subject matter meet to be protected?

(iv) who owns the rights?

(v) what are the rights?

(vi) how are the rights acquired?

(vi) how to administer and enforce the rights?; and

(vii) how are the rights lost or how do they expire?

As discussed above, it is necessary to distinguish the underlying TK subject matter (which may be defined as discussed in Section IV above) from:

- the nature of legal protection;
- the scope of rights given by protection; and
- the elements or expressions of TK that are specifically protected by distinct legal rights.

(i) What policy objective?

118. How a *sui generis* system is shaped and defined will depend to a large extent on the policy objectives it is intended to serve. Is it essentially defensive, in that it seeks to prohibit the misappropriation or culturally offensive misuse of TK, or is it analogous to laws for the

protection of cultural heritage? Does it have a broader policy goal, such as a system established in response to Article 8(j) of the Convention on Biological Diversity, with the overall goals of conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources? This may affect basic elements of the protection system, for instance in setting bounds to the scope of TK which is protected (see the examples in section IV(b) above). Is it focussed on promoting the appropriate commercialization of TK, or in preserving it within a specific cultural context?

119. Regardless of the answer to be given to this question, it should be stressed that a common denominator links all IP rights: the right to exclude others from making certain usage of the protected subject matter (e.g. acts such as reproducing, fixing, making, or using in the course of trade). Therefore, no matter what the ultimate purpose of the adopted system is, its basic features should be similar — or, at least, consistent — across national borders. Such a consistency would allow for the international articulation of national systems of TK protection, so as to avoid international misappropriation and to facilitate TK-related benefit sharing. If these common mechanisms are not desired in TK protection, then it is likely not to fall within the broad scope of an IP system, and the actual protection may be closer to cultural preservation or the protection of other rights, such as economic and social rights. One policy question that needs to be addressed, therefore, is the fundamental one of whether it is intended, at all, to establish or recognize property rights in knowledge (noting that these may be collective rights), or whether the protection intended is of a different nature altogether.

120. Accordingly, the policy objective for *sui generis* protection of TK should be clarified in terms of whether it is consistent with the broad thrust of intellectual property systems, and in particular whether the objective is such as:

- to safeguard against third party claims of IP rights over TK subject matter,
- to protect TK subject matter against unauthorized disclosure or use,
- to protect distinctive TK-related commercial products,
- to prevent culturally offensive or inappropriate use of TK material,
- to license and control the use of TK-related cultural expressions, and
- to license aspects of TK for use in third-party commercial products

121. In addition, the consideration of new sui generis systems for the protection of TK may need to be situated within a broader policy and legal environment, and draw on legal concepts and jurisprudence from a range of related areas, both IP-related and non-IP, for instance:

- concepts of unfair competition and unjust enrichment, misappropriation of reputation and goodwill;
- recognition of equitable interests and expressions of collective interests such as those relating to natural resources;
- the notion of moral rights, in particular the rights of integrity and attribution;
- human rights, and in particular economic, cultural and social rights;
- recognition of customary law and traditional rights;
- diverse conceptions of ownership and custodianship associated with traditional cultures;
- preservation of cultures and cultural materials;
- environmental protection, including the conservation of biodiversity;
- conceptions of morality and public order in legal systems; and
- approaches to defining and recognizing farmers' rights.

(ii) What is the subject matter?

122. Committee Members would need to consider what subject matter would potentially benefit from protection, and how this corresponds with the policy objectives of a protection system. By analogy with copyright law, this could be similar to the open-ended, illustrative list of works eligible for protection under the Berne Convention; or, by analogy with patent law, this could refer to a general concept to be interpreted and applied at the practical level through the regular operation of domestic law. An option, of course, is to include all TK, without any restriction or limitation as to subject matter, thus including cultural expressions, such as artistic, musical and scientific works, performances, technical creations, inventions, designs, etc. Simple inclusion within a general definition need not trigger enforceable rights, and this approach would leave open the possibility of defining more precisely the restrictions on what specific criteria the subject matter would have to meet in order to be eligible for protection.

123. Another option, mentioned above, is to confine protection to technical biodiversity-associated TK, leaving handicrafts and expressions of folklore to be covered by separate provisions — bearing in mind that the decision of breaking holistic TK into separate components (in other words, the choice as to the most adequate mechanism in the "menu" above mentioned) should belong to TK holders. This approach could take account of the fact that some policy objectives may be addressed by existing IP systems (including possible *sui generis* elements of those systems), and a separate, *sui generis* system may only be required or be suitable to serve other policy objectives.

124. The question of subject matter also depends on whether there is available overlapping forms of protection specifically directed at the form or expression of traditional knowledge, and in particular protection of traditional cultural expressions (TCEs). There is a clear choice between a *sui generis* TK system directed essentially at the content or substance of traditional know-how, skills, practices and learning, and subject matter cast more broadly to include TCEs and distinctive signs and symbols as objects of protection in their own right (see the discussion in paragraph 44 of document WIPO/GRTKF/IC/5/12).

(iii) What additional criteria for protection?

125. It may be necessary to clarify that even if some TK fits within a broad definition, it may need to meet distinct criteria to be protected under a *sui generis* system. This may apply, for instance, to TK which has already entered the public domain. TK holders should be aware that TK that is in the public domain cannot be recaptured without affecting legitimate expectations and vested rights of third parties. Therefore, there is the need for defining public domain in connection with TK. If, under a broad approach, information that has been disclosed is deemed to be automatically in the public domain, a vast area of TK has been effectively lost, for the purposes of IP protection, and it will be difficult, if not impossible, to recapture it. On the other hand, the preparation of databases or inventories with the purpose of documenting TK for the purposes of barring its misappropriation by third parties' patent applications could contribute to aggravating the problem. Committee Members can, however, resort to the concept of commercial novelty and establish that all elements (within the predetermined scope of subject matter) of TK which have not been commercially exploited prior to the date of the filing of the database are protected. The concept of commercial

novelty, actually, is not foreign to existing IP mechanisms, such as UPOV's plant variety protection,[104] the protection for layout-designs (topographies) of integrated circuits,[105] and the pipeline patent protection.[106]

126. Two different solutions in this regard can be found in the *sui generis* TK protection laws of Peru and Portugal.[107] The law of Peru, in Article 13, establishes that TK that has been made accessible to persons outside the indigenous peoples, through mass media, integrates the public domain. In this sense, the law of Peru has adopted a criterion of technical novelty. However, the use of TK that has fallen into the public domain within the last twenty years will be subject to the payment of a fee (Article 13.2). TK made available to the public prior to that 20 year term cannot, therefore, be protected retrospectively. In contrast, the Portuguese law permits the registration (for the purposes of legal protection) of TK "which, by the date of the filing of the application, has not been the subject of utilization in industrial activities or has not become publicly known beyond the people or the local community in which it has been developed." (Article 3(4)). The Portuguese law, therefore, combines the criteria of technical and commercial novelty so as to broaden the scope of protection. The law of Peru combines the notion of paid public domain (generally associated with lapsed copyright protection) with technical novelty.

127. Two additional elements, which have been adopted by the Law No. 20 of Panama, that could help confine protected subject matter within a better defined scope are: (a) the expression of the cultural identity of a given community; and (b) the susceptibility of commercial exploitation. First, only elements of TK that remain "traditional," in the sense that they remain intrinsically linked to the community that has originated them, would be protected under the *sui generis* system. In contrast, elements of TK which have lost that link, through a process of industrialization, for example, are not to be protected under the *sui generis* system.[108] Second, law makers may decide that TK that is not susceptible of commercial application shall not be covered by the *sui generis* system. In fact, it is not probable that third parties engage in the unauthorized or distorting use of TK that has not a commercial or industrial utility. By limiting the scope of TK, the law would reduce the costs of inscribing it into registries or inventories. However, it should be noted that the classification of TK into two categories (one that has commercial utility, either potential or actual, and another that has not) may run counter the very holistic nature of TK, according to which its spiritual and practical components are entangled in a manner that makes them more often than not indistinguishable.

128. Finally, the law may establish that the subject matter of protection must be contained in inventories, collections, compilations or, simply, databases of TK. The legal implications of this provision are examined below. What is relevant at this juncture is that Committee

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104 UPOV, 1991, Article 6.

105 Treaty on Intellectual Property in Respect of Integrated Circuits, of 1989, Article 7, incorporated into the TRIPS Agreement, Article 35.

106 See WIPO document WIPO/GRTKF/IC/2/9.

107 See Law No. 27.811, of August 10, 2001, of Peru, and Portugal's Decree-Law No. 118/2002, of April 20, 2002

108 They can nevertheless be protected under other forms of intellectual property. Some forms of handicrafts, for example, have been subject to intensive industrialization and modernization, thereby loosing their traditional characteristics and consequently ceasing to function as elements of cultural identification. Those handicrafts may be protected under the industrial design system, because they have become essentially consumption products.

members that decide to establish a national*sui generis* system may very well end up by acknowledging that TK, in order to be protected, must be documented and fixed. Documentation is of the essence for the process of preservation of TK. At the same time, description of TK has the advantage of giving public notice of the intention of the communities to appropriate the knowledge in question — documentation and fixation, therefore, operate as "no trespassing" signs, exactly like the claims of inventions in patent letters. On the other hand, where the TK holder relies on *sui generis* rights under the national law of one country to protect documented TK, the same rights may not be available in other jurisdictions, and the documentation process could lead to a loss of potential rights (e.g. trade secret rights) in important foreign jurisdictions (in the absence of a corresponding *sui generis* right in that country). Document WIPO/GRTKF/IC/5/5 covers issues concerning management of IP consequences of documenting TK, including in inventories or registries.

(iv) Who owns the rights?

129. Intellectual property rights are originally vested in the originators (authors, inventors, designers, creators, etc.), who then can transfer their rights through contract or legal arrangements. But TK is generally understood as being the result of creation and innovation by a collective originator: the community.[109] The same rationale, therefore, suggests that rights in TK should be vested in communities, rather than in individuals.[110] Clearly, it may become then necessary to establish a system of geographical and administrative definition of communities.[111] The collective entity which is entrusted with ownership or responsibility for the protected TK should clearly have the right to take legal action, and thus should have 'legal personality' for the purpose of legal procedures: this is an issue that also has international dimensions, in the event that *sui generis* protection of TK is available for foreign TK holders. An analogy may be found in the Paris Convention (Article 7*bis*) which provides for the protection of 'collective marks belonging to associations the existence of which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment.'

130. Although TK protection is generally perceived as a matter of collective rights, it may nonetheless be vested in individuals. The solution for that must be found in accordance with customary law. Actually, the importance of customary law is crucial for the attribution of rights and benefits within the community. Any legal solution concerning the protection, both at the national and international levels, of TK must recognize the importance of communities' customs and traditions involving the permission for individuals to use elements of TK, within or outside the community concerned, as well as issues concerning ownership, entitlement to benefits, etc. Those customs and traditions should be described and recorded together with

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109 The delegation of the Ukraine pointed to the need for further study on the issue of collective ownership during the Committee's third session: see document WIPO/GRTFK/IC/3/17, paragraph 279.

110 The laws of Panama (Article 1) and Peru (Article 1) address collective rights only. The Portuguese statute vests rights in both individual and collective entities (Article 9). The Thai statute adopts a similar approach, but the registration system depends on the collective or individual nature of the knowledge (Section 16).

111 Panama, for example, has passed a series of laws defining the territory of indigenous communities and establishing their own administrative bodies, according to the respective customs and traditions. See Aresio Valiente López (Compilador), *Derechos de los Pueblos Indígenas de Panamá, Serie Normativa y Jurisprudencia Indígena,* OIT y CEALP, Costa Rica, 2002.

the elements of TK, so that legal security could be created not only as regards the appropriated elements of TK themselves, but also in connection with their sharing within the communities. An example of how customary law can be integrated into a *sui generis* system of TK protection is found in Panama's Law No. 20, which, in Article 15, states:

> "The rights of use and commercialization of the art, crafts and other cultural expressions based on the tradition of the indigenous community, must be governed by the regulation of each indigenous communities, approved and registered in DIGERPI or in the National Copyright Office of the Ministry of Education, according to the case."[112]

131. Regional TK can be held by a community that extends across national borders. In the first case, IP being territorial, the community would need to obtain the recognition of its rights in the different countries in whose territories it traditionally dwells: this would raise the question, beyond the scope of this study, of whether the community would have the same legal identity in the two jurisdictions. TK can also be held by two or more neighboring communities that share the same environment, the same genetic resources and the same traditions. In this case, lawmakers have a choice: they can establish co-ownership of rights, or they can leave for the communities to separately apply for and obtain rights in jointly held TK. Whether there is conflict between overlapping rights in TK may depend on the nature of the rights: if the TK right extends, similar to copyright or trade secret protection, to use of the TK based on access to the original source (by analogy with copying a copyright work or breaching confidence in undisclosed information), then the right could only be used by a community to restrain a third party who had obtained the TK from that community. More complex ways of dealing with the overlap may arise if the system is closer to a patent right, if subsequent, independent derivation of the same TK would be captures by the TK right. One approximate analogy might be drawn with the problem of homonymous geographical indications for wines, for which the TRIPS Agreement provides for a WTO Member 'to determine the practical conditions under which the homonymous indications in question will be differentiated from each other, taking into account the need to ensure equitable treatment of the producers concerns and that consumers are not misled.'

132. Where two communities own overlapping TK rights, and there is no specific solution established (such as the 'practical conditions' for differentiation noted above), the question of cooperation or competition between the two communities arises. The need to consider competition and anti-trust questions in this regard was discussed in document WIPO/GRTKF/IC/4/8 (paragraph 63), and in the Committee's fourth session (document WIPO/GRTKF/IC/4/15, paragraph 141) discusses in more detail the need to give consideration to. From a practical point of view, the question arises whether it would be necessary to anticipate any such problems by clarifying the applicable law, creating exceptions to these laws if needed, or allowing for competition between communities.

133. An alternative to the attribution of rights to communities is the designation of the State as the custodian of the interests and rights of TK holders, to be exercised on their behalf and in their interests. An approximate precedent in international law for this approach can be found in Article 15(4)(a) of the Berne Convention which provides, in the case of 'unpublished works where the identity of the author is unknown,' that national legislation may 'designate

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[112] Article 85 of the Biodiversity Law of Costa Rica, Law No 7.788, of 1998, contains similar provisions.

the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.'

(v) What are the rights?

134. The various elements that compose TK in an intertwined manner belong both to the artistic/cultural and the technical/commercial/industrial fields. The rights to be acquired in those components must therefore be relevant in order to protect the legitimate interests of TK holders. When an authorized or distorting use is made of TK elements of an artistic and literary nature, right holders should be entitled to prevent others from reproducing and/or fixing and reproducing the product of the fixation. But when the unauthorized use is made of technical components of TK, right holders should be capable of preventing their use (use meaning the acts of making, using, offering for sale, selling, or importing for these purposes the protected traditional product, or, where the subject matter of protection is a process, the acts of using the process as well as the acts of using, offering for sale, selling, or importing for these purposes at least the product obtained directly by the traditional process). A *sui generis* system of IP protection of TK should therefore combine the features of copyright and related rights with the features of industrial property. The availability of differentiated enforcement measures should be independent of the holistic nature of the protected knowledge, thus allowing right holders to enforce their rights in specific elements of infringed TK.[113]

135. Analogous to copyright, TK rights should also comprise material and moral rights. Strong moral rights in TK may be indeed a crucial component of future *sui generis* systems because of their particular role on the protection and preservation of the cultural identity of traditional communities, including those elements of TK that are not to be commercially used.

136. The rights in TK could also comprise the right to assign, transfer and license those contents of TK databases with a commercial/industrial nature. If the possibility of transferring rights or licensing is not included in the law, any attempt to address the issue of benefit sharing under the Convention on Biological Diversity would necessarily fail.

137. The fact that TK rights are essentially of a collective sort does not impair their private nature — unless the law opts for electing the State as a custodian of community rights. Private rights must therefore interact with the public interest of society as a whole. Like all other IP rights (as well as all other private property rights), rights in TK may not be owned and enforced in a way as to prejudice the legitimate interests of society as a whole. TK rights conferred, therefore, must be subject to exceptions, such as the use by third parties for

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[113] Article 3(4) of the Portuguese law states:
"4 – The registration of traditional knowledge which, by the date of the filing of the application, have not been the subject of utilization in industrial activities or are have not become publicly known beyond the people[113] or the local community in which they have been developed, shall confer on the respective holders the right:
i) To prevent unauthorized third parties from reproducing, imitating and or using, directly or indirectly, for commercial purposes;
ii) To assign, transfer or licence the rights in traditional knowledge, including transfer by succession.
[…]."

academic or purely private purposes, or compulsory licenses on grounds of public interest, including circumstances of public health emergencies.[114]

138. As noted above, the elements previously mentioned refer to the IP protection of the contents of inventories of TK data. Those elements differ from the provisions of Article 2(5) of the Berne Convention,[115] of Article 10(2) of the TRIPS Agreement[116] and Article 5 of the WIPO Copyright Treaty, of 1996,[117] in the sense that protection is not to be provided merely on the creative or original selection or arrangement of the contents, but also on the contents themselves. Moreover, they also differ from the provisions of Chapter III of Directive 96/9/EC of the European Parliament and of the Council of March 11, 1996, on the legal protection of databases, to the extent that it is suggested that the rights be vested in TK holders, not in the makers of the databases; the protection should be afforded against the reproduction and/or the use of the contents of the databases, and not simply against their extraction or "re-utilization" in the sense of making them available to the public; and finally, rights would be enforceable against any sort of unauthorized reproduction and/or use of any content of the database, and not only against data the obtaining, verification or presentation of which has required "qualitatively and/or quantitatively a substantial investment."[118] As a matter of course, there is an essential difference between TK databases and factual databases (which are those that are dealt with by the EC Directive): TK databases do contain original material, although not necessarily protectable by traditional IP regimes. Factual databases contain facts, which are not deemed intellectual creations and, apart from secrecy, have not deserved IP protection.

139. As noted above, a *sui generis* system could also be developed so as to comprise specific features applying to specific elements of TK, such as handicrafts. Handicrafts of a certain community obey technical and artistic standards, which have been developed along generations, such as the particular choice of raw materials, methods of manufacture, colors, decorative motives, etc. Those standard elements could be the subject of a general

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114 Law No. 20 of Panama contains two exceptions to rights conferred: "small non-indigenous artisans" who dedicate to the manufacture, production and sale of the reproduction of crafts belonging to indigenous Ngobes and Buglés, and who reside in certain districts, are exempt of the provisions of the Law (Article 23); moreover, a sort of "prior user" exception applies to "small non-indigenous artisans" who were registered with the General Office of National Craftsmanship on the date of the entry of the Law into force (Article 24).

115 Article 2(5) of the Berne Convention for the protection of Literary and Artistic Works (1971) states: "Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections."

116 Article 10.2 of the TRIPS Agreement reads: "Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself."

117 Article 5 of the WIPO Copyright Treaty (1996) provides: "Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation."

118 See Directive 96/9/EC, Article 7, Official Journal L 077, 27/03/1996.

registration (or description in the database), which would grant exclusive rights in the style of a certain line of products handmade by the community in accordance with the described standards. Individual pieces deriving from that style could then be individually registered if the community so wished, in order to facilitate protection. Such a system would secure community rights in their handicrafts, thus avoiding their distorting reproduction by unauthorized third parties. Legal protection of expressions of traditional culture, as applied to handicrafts, is more fully discussed in WIPO/GRTKF/IC/5/3.

(vi) How are the rights acquired?

140. One option could be total lack of legal formalities, that is, protection is available as of the date the element of TK in question was created, irrespective of any formality.[119] That option, however, may give rise to problems of practicality, such as the need for giving evidence of the very existence of the piece of knowledge — a problem which is solved by means of an obligation of fixation — and the eventual need for proving plagiarism or infringement — a hurdle that is overcome by documentation/description and presumption of public availability of that information, as with patents and trademarks.

141. The second option would be to establish the right upon the filing of the compilation of TK data with a governmental agency. The elements of TK may be automatically registered, upon a formal examination as to documentation, legal representation, etc, or may be subject to a substantive examination. A merely formal examination seems to be the solution adopted by Portugal (Decree-Law No. 118, Article 3) and Peru (Law No. 27.811, Article 21). In both cases, the registration is subject to invalidation if the substantive conditions (such as novelty) have not been met. In contrast, Law No. 20 of Panama has adopted a technical examination, including the creation of the post of indigenous rights examiner in the industrial property office (DIGERPI), who works as a sort of examiner and auditor for all matters involving IP rights and interests of indigenous peoples (including, but not limited to, the filing of indigenous knowledge based applications in the area of patents by third parties).[120] The prosecution of medicinal TK registration under the Thai statute, which has also established a

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119 See Law on Biodiversity of Costa Rica No 7788, of 1998, Article 82.

120 Law No. 20, Article 9. This point brings up the matter of costs of making and registering traditional knowledge databases or inventories. Society must decide: those costs shall be borne either by the communities which will obtain property rights in the contents of inventories (in the form of fees), or by society. Panama has decided that society should subsidize communities' acquisition and maintenance of intellectual property rights in their knowledge (Law No. 20, Article 7: "[…] The procedure before DIGERPI will not require the service of a lawyer and it is exempt of any payment. […]"). That decision is ultimately related to a concept of distribution of wealth and the need for providing assistance for the empowerment of indigenous persons and traditional communities. On the other hand, the adoption of a transparent and effective system of traditional knowledge protection shall reduce transaction costs because it will eliminate the uncertainty that presently involves all matters of access to genetic resources, biopiracy and the distorting use of other traditional expressions of culture. Furthermore, once intellectual property protection of traditional knowledge is inserted into international trade agreements, distortions and impediments to trade in goods and services incorporating traditional knowledge will be reduced, to the benefit of exporters of legitimate handicrafts and traditional agriculture products. Incidentally, subsidies to individual inventors and small enterprises are available in the patent laws of several Committee Members — subsidizing traditional communities would not, therefore, run against the very concept of formal intellectual property rights.

technical examination, has drawn inspiration from the patent system — it contains provisions, among others, on the first-to-file rule (Section 26), on interference procedures (Sections 25 and 26) and opposition (Section 29).

142. Formal protection entails the issue of preventive control of the registrability of TK, in order to avoid the unwarranted claiming of subject matter. Moreover, both formal and informal systems of protection require the establishment of subsequent mechanisms of control over the legitimacy of claims. For example, if the law adopts the commercial novelty requirement as a condition for protection, elements that have been previously commercialized and, therefore, fallen into public domain, would be subject to be either previously rejected or subsequently invalidated. Additionally, administrative opposition and appeals could also be made available to third parties eventually harmed by undue claims.

143. The law may require that all TK elements submitted to registration and which have, potentially or actually, an industrial/commercial application be disclosed. Conversely, all other data of a purely spiritual and sacred nature could be kept confidential, if the community concerned so wished.

144. A formal registration system may be limited to having merely declaratory effect, rather than creating a strong presumption of validity of the claimed right. Proof of registration would therefore be needed with the single purpose of substantiating any ownership claim — it would not, thus, constitute rights. The difference between a declaratory registration and a constitutive one is that, under some circumstances, declaratory registration could be sought by traditional communities to strengthen their claims against acts of infringement which might have occurred prior to obtaining the formal title (and taking into consideration any applicable statute of limitation).

(vii) How to administer and enforce the rights?

145. Intellectual property rights are useless if they cannot be enforced. TK protection would not be effective without the availability of effective and expeditious remedies against their unauthorized reproduction and/or use (thus combining the features of copyright and related rights, on one hand, and of industrial property, on the other, for those elements of TK contained in inventories without a separation as to their spiritual or technical nature), such as injunctions and adequate compensation. The provisions of IP rights enforcement might be applicable in a subsidiary and *mutatis mutandis* manner.[121] In addition, there may be practical difficulties for holders of TK to enforce their rights, which raises the possibility of administration of rights through a distinct mechanism, possibly a collective or reciprocal system of administration, or a specific role for government agencies in monitoring and pursuing infringements of rights.[122]

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121 See Law No. 20 of Panama, Article 21.

122 See Law No. 27.811 of Peru, Articles 47 *et seq.* The Peruvian statute establishes that actions for infringement of rights in TK shall be dealt with by an administrative body (the INDECOPI, "Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual", the Peruvian agency that deals with competition and intellectual property law).

(viii) How are the rights lost or how do they expire?

146. Two approaches to this last issue are possible. One approach, which is generally preferred by the national laws which have so far dealt with protection of TK, is to establish protection for an indefinite period.[123] This approach speaks to the intergenerational and incremental nature of TK and recognizes that its commercial application, once the protection is secured, may take an extremely long time.[124] But if the protection of TK is to be established upon an initial act of commercial exploitation (for example, a period of fifty years counted from the first commercial act involving the protected element of TK, which could be renewable for a certain number of successive periods), then it might make sense to establish a predefined expiration, provided it would apply exclusively to those elements of TK with a commercial/industrial application and which could be isolated from the whole of the contents of the database without prejudice to its integrity.[125] Actually, as TK evolves, some of its elements necessarily become obsolete.

VIII. CONCLUSION

147. This document seeks to draw on the wide range of experience with the protection of TK that has been put before the Committee to record and clarify the range of policy issues and objectives that may need to be weighed when considering options for the protection of TK. For policymakers addressing the protection of TK, the following series of questions may help illustrate the policy options:

- the threshold question of whether the protection required is a form of intellectual property protection at all;
- whether the goal is essentially positive IP protection of TK, defensive protection, or a strategy combining the two;
- what options are available under conventional or general IP systems, and what options exist for adapted, expanded or *sui generis* elements of existing IP rights to protect TK subject matter;
- whether other IP rights apply to expressions, distinctive signs and symbols and other interests (such as suppression of unfair competition) to afford protection to the interests of TK holders;
- whether there is a combination of otherwise unprotected TK subject matter, public policy objectives and community needs and expectations that lead to an interest in *sui generis* systems for its protection;

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123 See the laws of Panama, Article 7, and Peru, Article 12.

124 Traditional knowledge protection would thus perform a prospecting function, such as purported by Edmund Kitch in connection with patents (see Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & Econ. (1977)). Only a few patents perform such a function because most inventions are developed as a response to actual market needs. But traditional knowledge in general is not created for a primarily commercial purpose. Its commercial applicability, therefore, unlike most patented inventions, requires market prospecting.

125 See the law of Portugal, which provides for a 50-year term of protection, renewable for one identical period (Article 3(6)). Under the Thai statute, the term of protection of traditional medicinal knowledge is the life of the right holder plus 50 years after his/her death (Section 33).

- what definition of TK should apply in the strict sense of protection of the content or substance of traditional knowledge;
- what mechanisms exist in other national systems, and what lessons can be learned from practical experience in this area;
- what policy framework and specific policy options should be applied to the *sui generis* protection of TK where national governments choose to pursue this mechanism; and
- how distinct national systems interact through bilateral, regional or international legal frameworks.

148. To advance discussion, increase the utility of the policy documents prepared for the Committee, and enhance capacity of policymakers and community representatives, it is suggested that the Secretariat for the Committee's consideration an annotated menu of options for the protection of TK subject matter, including adaptations and extensions of existing IP rights, and policy options for each aspect of *sui generis* protection of traditional knowledge, with an analysis of the potential benefits and drawbacks of each option and a consideration of the possibilities for interaction between national systems for protection of traditional knowledge. This would make use of the rich amount of material made available to the Committee concerning TK protection, and put it in a practical context for policymakers and community representatives. It would also provide a basic platform for international cooperation on policy questions. The development of an annotated menu of policy options would set out clearly what choices need to be addressed when considering new or enhanced IP protection for TK.

149. The Intergovernmental Committee is invited to consider the contents of this document and on that basis to decide the future directions of work concerning the intellectual property protection of traditional knowledge, including the possibility of the development of an annotated menu of policy options which sets out information on TK protection in a practical policymaking context.

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